TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 406.

CHESTER BADGER, CHARLES E. IVES, ET AL., CONSTITUTING THE BOARD OF AUDITORS OF THE TOWN OF AMBOY, PLAINTIFFS IN ERROR,

vs.

THE UNITED STATES EX REL. MATTHEW BOLLES AND M. SHEPARD BOLLES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED OCTOBER 7, 1875.

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1 Pleas in the circuit court of the United States for the northern district of Illinois, held at the United States court-rooms in the city of Chicago, in the district aforesaid, before the judges thereof, on Wednesday, the third day of March, in the adjourned March term of said court, in the year of our Lord one thousand eight hundred and seventy-five, and of our Independence the ninety-ninth year.

WILLIAM. H. BRADLEY,
Clerk.

UNITED STATES OF AMERICA, ON THE RELATION of Matthew Bolles and M. Shepard Bolles, partners in business, under the firm of M. Bolles & Co.,
vs.
CHESTER BADGER, CHARLES E. IVES, LEE Cronkite, Simon Badger, Oliver F. Warriner, and William B. Andress, the supervisor, town clerk, and justices of the peace, constituting the board of auditors of the town of Amboy, in the county of Lee, and State of Illinois. } Mandamus.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

Be it remembered that on the seventh day of January, A. D.
2 1875, came said petitioner, by his attorneys, and filed in the office of the clerk of the circuit court of the United States for said district, at Chicago, in the district aforesaid, his præcipe bond for costs and petition for a writ of mandamus in said entitled cause; which said præcipe bond and petition are respectively in the words and figures following, to wit:

Præcipe.

Northern district of Illinois, circuit court, Dec. term, 1874.

UNITED STATES OF AMERICA, EX RELATIONE Matthew Bolles & M. Shepard Bolles, partners, under the firm of M. Bolles & Co.,
vs.
CHESTER BADGER, CHARLES E. IVES, LEE Cronkrite, Simon Badger, Oliver F. Warriner, and William B. Andress, constituting board of auditors of town of Amboy. } Mandamus.

Issue summons returnable January 18th, 1875.
To marshal of northern district.

PADDOCK & IDE,
For Petitioners.

TO CIRCUIT CLERK.

(Endorsed:) Filed Jan'y 7, 1875. Wm. H. Bradley, clk.

Bond for costs.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

3 Circuit court, January term, A. D. 1875.

UNITED STATES OF AMERICA, EX REL. M. Bolles & Co.,
vs.
CHESTER BADGER, CHARLES E. IVES, & others. } In mandamus.

We enter ourselves security for costs in this cause, and promise to

pay all costs which may accrue to the opposite party in this action, or to any of the officers of this court, and, in default of payment by the plaintiffs of any costs ordered or adjudged to be paid by them, hereby agree and stipulate that execution may issue against our property for any costs taxed against them.

Dated this 8th day of January, A. D. 1875.

PADDOCK & IDE.

(Endorsed:) Filed Jan'y 7, A. D. 1875. Wm. H. Bradley, clerk.

Petition for writ of mandamus.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

Circuit court, December term, 1874.

To the honorable judges of the circuit court of the United States in and for the northern district of Illinois, at a term begun and holden at Chicago on the third Monday of December, A. D. 1874:

4 Respectfully represent unto your honors, your petitioners, Matthew Bolles and M. Shepard Bolles, partners in business under the firm of M. Bolles & Co., and citizens of the State of Massachusetts, that on, to wit, the seventh day of May, A. D. 1874, at the May term of said circuit court, your petitioners did recover in said court two certain judgments against the Town of Amboy, in the county of Lee, and State of Illinois, in two suits at law, wherein your petitioners were plaintiffs, and said Town of Amboy was defendant, and in which the damages and costs recovered by your petitioners were, in one of said suits, the sum of eighteen hundred and ninety-one and $\frac{80}{106}$ dollars damages and $36.20 costs, and, in the other of said suits, the sum of five hundred and fifty-one and $\frac{65}{100}$ dollars damages and $37.75 costs of suit, as will more fully appear by the record of said judgments now remaining in said court, and to which your petitioners refer for greater certainty.

Your petitioners further represent that said Town of Amboy is now, was at the time of the rendition of said judgments, and ever since, to wit, the year 1860, a municipal corporation, created and acting under and by virtue of the public statutes of said State commonly called the township-organization laws; that by the first section of article
5 thirteen of an act of the general assembly of said State, entitled "An act to revise the law in relation to township organization," in force March 4th, 1874, and by which, since the passage thereof, the said Town of Amboy has been controlled, it is provided that in each town the supervisor, town clerk, and justices of the peace of the town shall constitute a board of auditors, which shall consist of no less than three persons; and that it shall be the duty of said board of auditors to meet at the town clerk's office for the purpose of examining and auditing the town accounts semi-annually on the Tuesday next preceding the annual meeting of the county board, and on the Tuesday next preceding the annual town meeting, which annual meeting of the county board is fixed by said act to be holden on the second Tuesday of September in each year, and the annual town meeting on the first Tuesday in April in each year; further, that by said article thirteen it is also made the duty of said board of auditors to examine and audit

all claims and charges against their town, among which charges, by force of section six of article five of said act, judgments against the town are embraced, and to make a certificate to be signed by a majority of the said board, specifying the nature of the claim or demand, and to whom the amount is allowed, and to cause such certificate to
6 be delivered to the town clerk of said town, the aggregate amount of said claims allowed by said board being required by said act to be certified to the county clerk of the county, within which such town is situated, at the same time and in the same manner as other amounts required to be raised for town purposes, to be levied and collected as other town taxes, except that in towns mentioned in section four of article four of said act, the amount is required to be certified to the county board, who shall include the same in their estimate of the town expenses, within which exception, your petitioners aver, the said Town of Amboy is not included; and your petitioners further show that, by said article 13, it is provided that the moneys necessary to defray the said town charges shall be levied on the taxable property in each town in the manner prescribed in the act of said general assembly for raising revenue and other moneys for State and county purposes and expenses.

And your petitioners further represent that on, to wit, the 29th day of August, A. D. 1874, the board of auditors of said town of Amboy consisted of Chester Badger, the supervisor; Charles E. Ives, the town clerk; Lee Cronkrite, Oliver F. Warriner, Simon Badger, and William B. Andruss, justices of the peace of said town; and that on said 29th day of August, 1874, the said judgments and costs remaining
7 due and wholly unpaid, and still belonging to your petitioners, your petitioners did present to said board of auditors, and each member thereof, a sworn statement of their said claims against said town, accompanied with an affidavit that said claims were correct, just, and unpaid; and also then delivered to said town clerk, to be by him filed in his office, certified copies of the said judgments under the seal of said court; and did then, and at said town, demand of said board, and each member thereof, that they should audit and allow said claims, and take the necessary steps to allow and have the same certified to the town clerk of said town, on the first Tuesday in September, 1874, so that provision might be made for the payment of the said bills according to law, and that they should meet on said first Tuesday for said purposes.

Your petitioners further represent that, notwithstanding the said demand made upon them, the said persons, constituting said board of auditors of the town of Amboy, have refused and neglected, and still refuse and neglect, to comply with said demand, and to audit and allow said claims of your petitioners against said town of Amboy, or to take any steps whatever towards providing for the payment of the same; but on the contrary, after the said demand had been made upon them, the said Chester Badger, supervisor, Charles E. Ives, town clerk,
8 Oliver F. Warriner and William B. Andruss, justices of the peace, for the purpose of evading their duty in the premises, pretended to resign their said offices, and neglect to discharge the duties thereof, but whether said persons have in fact resigned or not your petitioners represent that no other persons have been elected or appointed to succeed them in said offices, and that the remaining two justices of the peace, to wit, Simon Badger and Lee Cronkrite, wilfully and designedly, and for the purpose of defeating your petitioners in the collection of their said udgments, will not act as such auditors, or meet and associate with them,

to constitute a board of auditors, the collector and assessor of said town, as they by law are authorized to do, nor will they fill by appointment, as by law they are empowered to do, any of said alleged vacancies, if in fact they exist, in the offices of supervisor and town clerk of said town. And your petitioners aver, upon information and belief, that the said acts, omissions, and refusals of said persons constituting said board of auditors of the town of Amboy have been done by them by collusion with each other, and with the intent and design to delay and hinder your petitioners in the collection of said judgments, and to defraud your petitioners out of their just claims against said town.

And your petitioners represent that it was and is the duty of the
9 said board of auditors of said town of Amboy to meet, audit, allow, and certify as aforesaid to the said claims of your petitioners; and that by reason of the premises and the wrongful acts and refusals of said Chester Badger and his said associates, done as aforesaid, your petitioners are now, and have been, unable to obtain the necessary levy and collection of taxes in said town, for the purpose of satisfying said judgments; that no provision whatever, or levy of taxes, has been made by said town, or otherwise, to pay said judgments, or the indebtedness upon which said judgments are based, nor has said town heretofore appropriated any funds for such purpose.

Wherefore your petitioners pray that the process of summons, according to the statute in such cases provided, issue out of this court, commanding the said Chester Badger, Charles E. Ives, Lee Cronkrite, Oliver F. Warriner, Simon Badger, and William B. Andruss, constituting the said board of auditors of the town of Amboy aforesaid, to appear at the present term of said court, by some day, to be fixed by the court, and show cause why a writ of mandamus should not issue against them, requiring them to meet at such time as shall be fixed by the court, and audit and allow the said judgments and costs of said petitioners against said town, and certify the same in the manner provided by said act of March 4th, 1874, and to do and perform all such acts and things in the premises as the law requires; and that your petitioners may have such other
10 and further relief in the premises as to your honors may seem meet; and your petitioners will ever pray, &c.

M. BOLLES & CO.,
By PADDOCK & IDE,
Their Attorneys.

UNITED STATES,
Northern District of Illinois:

George O. Ide, being sworn, says he is an attorney of said petitioners, and by them authorized to make this affidavit on their behalf; that he has read the foregoing petition, and says that the matters therein stated as of knowledge are true in substance and fact; and those stated upon information and belief he verily believes to be true.

GEORGE O. IDE.

Subscribed and sworn to before me this 6th day of January, 1875.

E. A. DRUMMOND,
U. S. Com.

(Endorsed:) Filed Jan'y 7, 1875. Wm. H. Bradley, clk.

On the same day, to wit, the 7th day of January, A. D. 1875, in the [illegible]ember term, A. D. 1874, of said court, in the record of the proceedings

thereof, in said entitled cause, before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

THE UNITED STATES OF AMERICA, ON THE RELATION of Matthew Bolles et al.,
vs.
CHESTER BADGER, CHARLES E. IVES, ET AL. } Mandamus.

11 Now come the relators by their attorneys, and file their petition herein for a writ of mandamus, and, on motion of said attorneys, it is ordered that a summons issue to the defendants, returnable to the third Monday of January instant, for them to answer said petition, and shew cause why the prayer thereof should not be granted.

On the same day, to wit, the 7th day of January, A. D. 1875, a writ of summons issued out of said clerk's office against said defendants, in said entitled cause; which said writ, together with the return of the marshal annexed thereto, is in the words and figures following, to wit:

12 *Writ of summons.*

Circuit court of the United States of America, northern district of Illinois, ss:

The United States of America to the marshal of the northern district of Illinois, greeting:

We command you to summon Chester Badger, Charles E. Ives, Lee Cronkrite, Simon Badger, Oliver F. Warriner, and William B. Andruss, constituting the board of auditors of the town of Amboy, if found in your district, to be and appear before our judges of our circuit court of the United States for the northern district of Illinois, at the present term thereof, now being holden at Chicago, in the district aforesaid, on the third Monday of January instant, to answer the petition of The United States of America, on the relation of Matthew Bolles and M. Shepard Bolles, (partners under the firm of M. Bolles & Co.,) for a writ of mandamus, and show cause why a peremptory writ of mandamus should not issue against you, as prayed in said petition; and have you then and there this writ.

Witness the Hon. Morrison R. Waite, Chief-Justice of the Supreme Court of the United States of America, at Chicago aforesaid, this 7th day of January, in the year of our Lord one thousand eight hundred and seventy-five, and of our Independence the 99th year.

[SEAL.] WM. H. BRADLEY, *Clerk.*

13 *Special deputy's return.*

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

Know all men by these presents that I have appointed, and by these presents do appoint, Thomas Foristall my true and lawful deputy to execute the annexed writ, United States, ex rel., vs. Chester Badger et al., and to make return of the execution thereof according to law.

B. H. CAMPBELL, [SEAL.]
United States Marshal for the Northern District of Illinois.

I have served the annexed writ in the following manner, to wit, by reading the same to and in the presence and the hearing of Chester Badger, therein named, on the 12th day of January, A. D. 1875; of Simon

Badger, therein named, on the 12th day of January, A. D. 1875; of Lee Cronkrite, therein named, on the 12th day of January, A. D. 1875; of Charles E. Ives, therein named, on the 12th day of January, A. D. 1875; Oliver Warriner, therein named, on the 12th day of January, A. D. 1875.

William B. Andrus not found in my district.

B. H. CAMPBELL,
United States Marshal,
By THOS. FORRISTALL,
Special Deputy.

Thomas Forristall, being duly sworn, deposes and says that he served the annexed writ as stated in the foregoing return, and that the
14 expense returned by him, in addition to the fees, was actually incurred, and that the same is according to law.

Sworn to before me this 12th day of January, A. D. 1875.

[SEAL.] L. B. CROOKER,
Notary Public.

(Endorsed:) Filed Jan'y 18th, A. D. 1875. Wm. H. Bradley, clerk.

Afterwards, to wit, on the 18th day of January, A. D. 1875, in the said December term, A. D. 1874, of said court, in the record of the proceedings thereof, in said-entitled cause, before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

THE UNITED STATES OF AMERICA, ON THE RELATION of Matthew Bolles et al.,
vs.
CHESTER BADGER, CHARLES E. IVES, ET AL. } Mandamus.

On motion of the defendant, by its attorney, the time to answer the petition herein is extended twenty days.

15 Afterwards, to wit, on the 2nd day of February, A. D. 1875, said respondents, by their attorneys, filed in said clerk's office their answer in said-entitled cause; which said answer is in the words and figures following, to wit:

Answer.

UNITED STATES OF AMERICA,
Northern District of Illinois:

Circuit court, Dec. term, A. D. 1874.

THE UNITED STATES, EX RELS. MATHEW Bolles and M. Shepard Bolles, composing the firm of M. Bolles & Co.,
vs.
CHESTER BADGER, CHARLES E. IVES, LEE Cronkite, Oliver F. Warriner, Simon Badger, & William B. Andruss, &c. } Petition for mandamus.

The answer of said defendants to said petition.

Respondents, saving and reserving to themselves all manner of
16 advantage of exception that may be had or taken to said petition by reason of its uncertainty and insufficiency, for answer there-

unto, or to so much thereof as these respondents are advised is material or necessary to make answer thereunto, answering, say that they have no personal knowledge whether the petitioners obtained the judgments described in the petition or not, but they are informed that the plaintiffs did obtain such judgments; but whether the same be valid & legal against said town of Amboy, these respondents know not.

Your respondents, not being attorneys or versed in law, can express no opinion as to the same, but they do know that such judgments ought not to be held to be valid, because the same were predicated upon certain interest-coupons attached to certain railroad bonds purporting to have been issued by the supervisor & town clerk of said town of Amboy to the Chicago & Rock River Railroad Company, to aid in the construction of a railroad from Rock Falls, Illinois, on Rock River opposite to Sterling, to Chicago, or its vicinity, by the way of Amboy,
17 Illinois, with a branch from said Amboy running into Bureau County; which said railroad was never built, so that in fact the said town of Amboy failed to obtain the consideration for which said bonds & coupons had been issued. These respondents understand that there was no appearance by the town in the suits in which said judgments were obtained, (if any such judgments were obtained.)

These respondents were advised that by the decissions of the Supreme Court of the United States, substantially no defense is allowed in the United States courts when railroad bonds or coupons are sued.

Your respondents, further answering, admit that at the date of said purported judgments, and ever since, the said town of Amboy has been a municipal corporation under the township organization laws of this State.

Respondents further admit that by the first section of the township organization act in force March 4th, 1874, it is provided that in each town the supervisor, town clerk, & justices of the peace of the town shall constitute a board of auditors, which is to consist of not
18 less than three persons.

These respondents further admit that it is the duty of said board of auditors to meet at the town clerk's office for the purpose of examining & auditing the town accounts, as alleged in said petition.

They further admit that it is the duty of said board of auditors to examine and audit all claims & charges against said town; but these respondents deny that by force of section six of article five of said act, judgments against the town are embraced so as to make it the duty of town auditors to examine and pass upon the validity of purported judgments rendered against the town, and they deny that it is the duty of such board to make any certificate in regard to judgements purporting to have been rendered against the town; that said section six provides as follows in regard to judgments: "Judgments recovered against a town, or against town officers, in actions prosecuted by or against them in their name of office, shall be a town charge, and when collected shall be paid to the person or persons to whom the same shall have been adjudged."

19 These respondents insist that it is not provided by said section, or any other provision of law of which they have any knowledge, that the board of auditors of a town have the legal right to revise the proceedings of courts in rendering judgments against towns. Nor would any certificate of theirs add to the force or binding obligation of a judgment against the town rendered by a court of competent jurisdiction that the clerk of the town, in certifying the indebtedness of the town, when in the form of judgments, would not & could not be affected by

the action or determination of the board of auditors; but, on the contrary, if there was such a valid judgment or judgments, it would be incumbent on the town clerk to certify the same to the county clerk, with the other indebtedness of the town, whether directed so, or not so, by the board of auditors of the town.

Your respondents admit that it is the duty of the town clerk to make returns to the county clerk, as alleged in said petition.

And respondents further admit that by said article 13 of the township organization act it is provided that the money necessary
20 to defray the town charges shall be levied upon the taxable property of each town in the manner described in the act of said general assembly, for raising revenue & other moneys for State & county purposes, as in said petition alleged.

And your respondents, further answering, admit that on the 29th day of August, A. D. 1874, the board of auditors of said town of Amboy consisted of the respondents, but said respondents do not admit that the purported judgments of the petitioners were due & unpaid & still belong to said petitioners. Of such alleged facts your respondents had not then any personal knowledge, nor have they at this time, or since then, any such knowledge, & they are unable to say whether said petitioners had any such valid judgments against the said town of Amboy or not.

Your respondents, further answering, admit that said petitioners, by their attorney, did present to the then said board of auditors of the town of Amboy, and each member thereof, a sworn statement of their said purported judgments against the town of Amboy, as alleged in said petition. They also admit that said petitioners delivered to said
21 town clerk, to be by him filed in his office, duly-certified copies of said purported judgments, and did then & there demand of said board that they should audit & allow said purported judgments, and take the necessary steps to allow & have the same certified to the town clerk of said town on the 1st Tuesday in September, A. D. 1874, and that they should meet on said Tuesday for said purpose.

Respondents, further answering, say that the notice & demand aforesaid served upon your respondents were in writing. Copies thereof are herewith filed with this their answer, and respectively marked "Exhibits A & B," and made a part of this answer; that said papers were the only papers served by petitioners upon these respondents then or since.

Respondents, further answering, insist that by the papers so served upon them they were not able to decide whether said petitioners had or had not any valid judgment or judgments against the town aforesaid; that the purported certified transcript of such alleged judgments were not served upon the board of auditors, the respondents herein, nor
22 were they requested to examine the same, but they were required to audit and allow said judgments upon the sworn statements of petitioners' attorney, & respondents did not examine said certified copys of said purported judgments to determine whether they would comply with petitioners' said demands. They were not required to make such examination by the petitioners' attorney, and if they had made such examination, they would not have been competent to decide on the validity of said purported judgments, nor was it their duty so to have done; that the entire matter was without their jurisdiction & about which they had nothing to do.

Your respondents, further answering, admit that your respondents, the then board of auditors of said town, refused and neglected, & still refuse and neglect, to comply with said demands to audit and allow

said purported judgments of petitioners, or to take any steps whatever towards providing for the payment of the same, believing then, as they do now, that it was not their duty so to do.

Your respondents, further answering, admit that after that, but upon the 29th day of August, A. D. 1874, the said Chester Badger, supervisor, Oliver F. Warriner & William B. Andruss, justices of the peace, resigned their respective offices, and that on, to wit, the 31st day of the same month, Charles E. Ives, the town clerk, likewise resigned his
23 office aforesaid; that by section (4) four of article ten of the township organization act, referred to in the petition aforesaid, it is provided as follows, to wit: "The justice of the peace of a town may, for sufficient cause shown to them, accept the resignation of any town officer of their town, and whenever they shall accept any such resignation they shall forthwith give such notice thereof to the town clerk of the town, who shall make a minute thereof upon the town records, provided that in towns having more than two justices of the peace such resignation may be accepted by any two of them."

Your respondents, further answering, say that the said Chester Badger, supervisor, Charles E. Ives, town clerk, and William B. Andruss and Oliver T. Warriner, justices of the peace of said town, did resign their respective offices under and by virtue of said section; that their said resignations were made to & accepted by Lee, Cronkite, & Simon Badger, then as now justices of the peace of said town; and said Cronkite & Badger, upon accepting such resignations of Chester Badger, William B. Andruss, & Oliver T. Warriner, forthwith gave notice thereof to the town clerk of the town of the resignation of said
24 Chester Badger & Andruss & Warriner, & said clerk then & there, before his resignation, made a minute thereof upon the town records of said town. The resignation of Charles E. Ives, the town clerk, was likewise duly accepted on said 31st day of August by said remaining two justices of the peace, & notice thereof is entered upon the town records of said town, whereby said Chester Badger, Charles E. Ives, William B. Andruss, and Oliver T. Warriner ceased to be town officers of said town & members of the board of auditors thereof.

Your respondents, further answering, deny that their resignation' aforesaid were made for the purpose of evading their duty in the premises. They claim that they had no duties to perform in the premises, and that the records of the town clerk's office show that their resignations were not made for any such purpose or object; that said records show that said parties so resigning gave other sufficient causes to the said remaining two justices of the peace of said town for them to accept of their resignation; that said records do show that the causes for such resignations given to the justices aforesaid were as follows, to
25 wit:

"Andruss, pressure of other business & duties, & poor health."

"Warriner, by reason of business, which occupies my entire time, rendering it impossible for me to properly discharge the duties of my office."

"Chester Badger, by reason of the pressure of business, rendering it impossible for me to properly discharge the duties of supervisor."

"Charles E. Ives, town clerk, pressure of other business."

Respondents insist that the causes aforesaid shown to said remaining two justices of the peace were deemed by them to be sufficient, and they having accepted the resignations aforesaid, as they had the right to do under the statute, their decision is conclusive of the question, and the

same is not subject to review by this or any other court, for the reason that no such revision is authorized by the statute.

These respondents further claim & insist that the acts aforesaid were done and performed in good faith both upon the part of resigning officers & of the justices who accepted such resignations; and that since the times aforesaid, to wit, the 29th & 31st August, 1874, such resign-
26 ing officers have ceased to be officers of the said town of Amboy.

Your respondents, further answering, admit that no other persons have been elected or appointed to succeed the resigning officers in their said offices, and that the remaining two justices of the peace, Simon Badger & Lee Conkrite, will not act as such auditors, or meet or associate with them to constitute a board of auditors, the collector & assessor of said town, nor have they filled by appointment any of said vacancies; that they claim and insist, and give as reasons therefor—

1st. That they had no legal right to act as such board, or to associate the collector & assessor with them to act as such; that the resigning officers aforesaid ceased to be town officers of said town & members of the board of auditors on the 29th & 31st days of August, A. D. 1874, at the times their resignations were accepted & recorded, and the same were not officers of said town at the time fixed by law for the meeting of boards of auditors of towns, on the 1st Tuesday in September, A. D. 1874; that by section 2nd of article 13th of the said township-organization act, referred to in the petition, it
27 is provided as follows, to wit: "In case of the absence of any or either of the said officers, or their failure to attend any meeting of the board, those attending may associate with them the collector or assessor of said town, or both, in the place of any absentee or absentees, as the case may be, who shall act for the time being as members of such board."

Your respondents allege the above to be the only provision of law on the subject, and by it the said two remaining justices of the peace, Cronkite & Simon Badger, were authorized to associate with them the assessor and collector only in case of the other town officers' absence; as there were no other town officers at the time fixed by law for the meeting of the board of auditors, (which was the first Tuesday in September,) there were no town officers absent from such meeting, consequently said justices could not call in the assessor or collector to act with them; and the law requiring no less than three persons to constitute the board of auditors, said justices were unable then to constitute such a board, and therefore did not.

2d. Said two remaining justices did not fill such vacancies, for the reason that the law did not require them to so to do, but only made it lawful for them to fill such vacancies; the statute being as fol-
28 lows, to wit, (sec. 2, article 10, of the township-organization act of March 4th, 1874:)

"Whenever a vacancy shall occur from any cause, &c., it shall be lawful for the remaining officers, &c., to fill any vacancy thus occurring," &c.

These respondents, further answering, set up and allege and claim, as a further reason why they (said remaining justices) did not fill said vacancies that they were not desired to do so by any of the citizens or inhabitants of the town of Amboy, nor were they so requested by the said petitioners, or their attorneys, or by any one whatever, nor did the people of said town desire the same.

Further, these respondents insist that if the said two remaining justices

had desired to fill said vacancies, it would have been impossible for them to have done so, for the reason that no person could have been procured in said town of Amboy to accept such offices under any such appointment; the petitioners having served their notice & demand aforesaid upon the respondents aforesaid, & the resignations having occurred as aforesaid, it became thereby well known to the citi-
29 zens & inhabitants of said town that the petitioners were seeking to compel the town officers of said town to audit & allow said purported judgments of said petitioners, & to have taxes imposed upon the property of the inhabitants of said town to pay the same, and such was the universal & decided aversion in said town against the payment of petitioners' judgments that no one could have been induced to serve in any town office of said town under the circumstances aforesaid; no one in said town could be procured who would voluntarily consent to be a party to any such proceedings, or have anything to do with the same, under the circumstances; that it was well known in said town that said petitioners had recovered their purported judgments aforesaid upon a part of the interest-coupons attached to the bonds for one hundred thousand dollars, which had been illegally & fraudulently obtained from the supervisors & town clerk of said town, & for which no consideration had in fact been *recovered* by said town, and that said bonds & coupons were an unmitigated fraud & swindle against said town, the collection of which was sought to be enforced against
30 said town (as is usual in such cases) by pretending that the same were held by bona-fide assignees, when in fact the said holders were confederates with the original guilty parties who had fraudulently obtained said bonds, but the same was so shrewdly managed by the parties thereto that the town could not furnish sufficient proof of such collusion.

Your respondents, further answering, deny that the said two remaining justices of the peace willfully & designedly acted for the purpose of defeating said petitioners in the collection of their said purported judgments aforesaid, as is charged in said petition, but insist that their action in the premises was such as the law required, and that in fact they could not have done other than they have done; and your respondents further deny that the acts, omissions, & refusals of respondents have been done by them by collusion with each other & with the intent & design to delay & hinder said petitioners in the collection of said purported judgments & to defraud said petitioners out of their just claims against said town, as in said petition alleged; the respondents
31 deny that said petitioners had any just claims against said town, and if they had, these respondents deny that the board of auditors of said town had or could delay the petitioners in the collection of their purported judgments.

Respondents, further answering, deny that it was the duty of said board of auditors to meet, audit, allow, & certify the said purported judgments of petitioners; they deny that it was any more their duty to have audited, allowed, & certified said purported judgments that it would have been their duty to have audited, allowed, & certified the moneys authorized to be raised by the vote of a town meeting for any town purposes, or every sum directed by law to be raised for any town purpose; they insist that the statute only required them, as such board of auditors, to examine & pass upon accounts & charges which had not been audited or allowed by any other tribunal.

And their business was not to revise the work which had already been performed by courts, or other tribunals, who had passed upon & de-

cided the validity of purported claims and charges against said
32 town, and they insist that under the 7th section of article 13th of the township-organization act it was the duty of the town clerk alone (if any one) to have certified said purported judgments as if the same had been allowed by this court, and that no other authority was requisite to have authorized said clerk to so certify the same, if the judgments were valid.

Your respondents, further answering, deny that it is the duty of said respondents to meet & audit said judgments, not only for the reason that all of them except the two justices aforesaid have ceased to be members of the board of auditors, and the certificate of the board of auditors, even if they were still in office, would be of no benefit to the petitioners, and for the further reason that by the township-organization act boards of auditors of towns can only meet twice per year to audit town charges against the town; the times of such meetings being fixed by law to be on Tuesday next preceeding the annual meeting of the county board & on the Tuesday next preceeding the annual town meeting.

Your respondents, further answering, deny that by reason of the wrongful acts & refusals of Chester Badger and his said associates
33 said petitioners have been unable to obtain the necessary levy & collection of taxes in said town for the purpose of satisfying said purported judgments, as in said petition alleged; they have already given the reasons why the same could not be true, & they now assign the further reason that said purported claims of petitioners were not presented to any of the town officers until the 29th day of August, A. D. 1874, when it was too late for the clerk of said town to have certified to the county clerk said purported indebtedness of the town; that by the revenue law of this State then & now in force it is provided as follows, to wit, (sec. 122:) "The proper authorities of towns, townships, districts, and incorporated citys, towns, & villages collecting taxes under the provisions of this act shall annually, on or before the 2nd Tuesday in August, certify to the county clerk the several amounts which they severally require to be raised by taxation, anything in their respective charters or in acts heretofore passed by the general assembly of the State to the contrary notwithstanding." Said purported claims of petitioners not having been presented on or before the 2nd Tuesday
34 in August, A. D. 1874, the same could not have been embraced in the town clerk's certificate for that year, and when said claims were so presented as aforesaid, the town clerk had already certified to the county clerk the indebtedness of said town for which taxes were required to be levied.

Your respondents also call the attention of this court to the fact that neither the present town clerk, nor any of the officers of said town, can or will be in office when the time arrives for the town clerk of said town to certify to the county clerk for the year A. D. 1875, the indebtedness of said town, to discharge which taxes will be required to be laid.

Respondents, further answering, admit that no provision whatever or levy of taxes have been made by said town, or otherwise, to pay said purported judgments, or the purported indebtedness upon which said pretended judgments are based, nor has said town heretofore appropriated any funds for such purpose, with this exception: that the auditor of state certified to the county clerk of Lee County, Illinois, the amount requisite to pay the interest-coupons upon the bonds aforesaid, and
35 the clerk accordingly levied the requisite amount of taxes upon

the property of said town, but the town & the tax-payers thereof refused to pay the same, and procured a decree of the circuit court of Bureau County, to which said case had been transferred by change of venue, perpetually enjoining collection of the taxes of the year A. D. 1872; they likewise obtained in the circuit court of Lee County a similar decree, perpetually enjoining the collection of such taxes for 1873; and they again in 1874 obtained a decree from the circuit court of Lee County, perpetually enjoining the collection of any such tax in future to pay said interest-coupons or bonds aforesaid; the circuit courts aforesaid holding the bonds & coupons so issued to *to* not be obligatory upon said town, or at least that it was not legal to collect taxes in the manner aforesaid to pay the same, or any part thereof.

These respondents, further answering, claim and insist that since the decrees aforesaid, the respondents, & the town aforesaid, and the tax-payers thereof, are satisfied that such bonds & coupons ought not to be paid; that the same are illegal & unjust, and the attempts of the
36 petitioners to collect their said purported judgments are wrongful, illegal, oppressive, & fraudulent, as such was also the opinion of your respondents, and the leading citizens generally of said town, when first they discovered the fraud that had been perpetrated upon said town in getting the bonds and coupons aforesaid to build a railroad which was never built.

All the other allegations in said petition contained not herein answered are denied, and respondents deny all the fraud, collusion, & conspiracy, charged upon them in said petition. Having answered fully, they pray the said petition may be dismissed, with costs.

PETERS, ECKELS & KYLE,
Attys. for Defendants.

N. H. RYAN O'BRIEN,
BARGE & DIXON,
Of Counsel for Respondents, Chester Badger, Charles E. Ives, Lee Cronkite, Oliver F. Warriner, Simon Badger, William B. Andruss.

37 UNITED STATES OF AMERICA,
Northern Dist. of Illinois, ss:

Chester Badger, Charles E. Ives, Oliver F. Warriner, Lee Crokrite, Simon Badger, and William B. , being each duly sworn, say that the statements contained in the foregoing answer so far as stated upon their own knowledge are true, and all the other statements therein contained the' believe to be true.

CHESTER BADGER.
CHARLES E. IVES.
LEE CRONKITE.
OLIVER F. WARRINER.
SIMEON BADGER.
WILLIAM B. ANDRUSS.

Subscribed & sworn to before me this 26th day of January, A. D. 1875.

[SEAL.] JOSIAH LITTLE,
Notary Public.

38 EXHIBIT A.

Town of Amboy, in Lee County, Ill., to M. Bolles and Co., Dr.

To amount of judgment rendered May 7th, 1874, in United States circuit court, northern district of Illinois, on said date, in favor of Matthew Bolles & M. Shepard Bolles, partners in business, under the firm of M. Bolles & Co., against said town	1,891 80
To interest on judgment	35 00
To costs in said suit as taxed	36 20
	$1,963 00

To the board of town auditors of the town of Amboy:

We hereby demand of you that you audit and allow the above bill against said town, and that you take the necessary steps to allow and have the same certified to the town clerk of said town, as required by law, on the first Tuesday in September, 1874, so that provision may be made for the payment of said bill according to the township organization and revenue laws of the State of Illinois, and that you and each member of said board do meet on said first Tuesday for the above purpose.

Dated August 24th, 1874.

M. BOLLES & CO.,
By GEO. O. IDE,
39 *Their Atty. & Agent.*

STATE OF ILLINOIS,
Cook County, ss:

Geo. O. Ide, of said county, being duly sworn, says that he is an attorney and agent of the above-named M. Bolles & Co., & by them authorized to make said demand, & that the above balance of said bill is correct, just, and wholly unpaid.

GEO. O. IDE.

Subscribed and sworn to before me, a notary public of the city of Chicago, in said Cook County, this 27th day of August, A. D. 1874.

[SEAL.] JOHN E. KENT,
Notary Public, Cook Co., Ill.

EXHIBIT B.

Town of Amboy, in Lee County, Illinois, to M. Bolles & Co., Dr.

To amount of judgment rendered May 7th, 1874, in United States circuit court, northern district of Illinois, on said date, in favor of Matthew Bolles and M. Shepard Bolles, partners in business, under firm of M. Bolles & Co., against said town	$551 65
To interest on judgment	10 46
To cost in said suit as taxed	37 75
	$599 86

40 To the board of town auditors of the town of Amboy:

We hereby demand of you that you audit and allow the above bill against said town, and that you take the necessary steps to allow and have the same certified to the town clerkof said town, as required by law, on the first Tuesday in September, 1874, so that provision may be made for the payment of said bill, according to the township-organiza-

tion and revenue laws of the State of Illinois; and that you and each member of said board meet on said first Tuesday for the above purpose.

Dated August 24th, 1874.

M. BOLLES & CO.,
By GEO. O. IDE,
Their Att'y & Ag't.

STATE OF ILLINOIS,
Cook County, ss:

Geo. O. Ide, of said county, being duly sworn, says that he is an attorney and agent of the above-named M. Bolles & Co., and by them authorized to make said demand, and that the above balance of said bill is correct, just, and wholly unpaid.

GEO. O. IDE.

41 Subscribed and sworn to before me, a notary public of the city of Chicago, in said Cook County, this 27th day of August, A. D. 1874.

[SEAL.]

JOHN E. KENT,
Notary Public, Cook Co., Ill.

(Endorsed:) Filed Feb'y 2, 1875. Wm. H. Bradley, clk.

42 Afterwards, to wit, on the 8th day of February, A. D. 1875, said petitioners, by their attorneys, filed in said clerk's office their demurrer to the answer of said defendants in said entitled cause; which said demurrer is in the words and figures following, to wit:

Demurrer to answer.

United States circuit court, northern district of Illinois, December term, 1874.

UNITED STATES OF AMERICA, EX REL. M. Bolles & Co., *vs.* CHESTER BADGER ET AL. } Mandamus.

And said petitioners come and defend the wrong & injury, when, &c., and say that said defendants' answer to the petition in the above cause is wholly insufficient in law for them to reply unto; and they also demur to the several parts thereof, except those wherein they admit or deny the facts alleged in the petition, as being argumentative, scandalous, evasive, and frivolous, and this they are ready to verify; wherefore they pray judgment, &c.

By PADDOCK & IDE,
Their Attorneys.

(Endorsed: Filed Feb'y 8, 1875. Wm. H. Bradley, cl'k.

43 Afterwards, to wit, on the 8th day of February, A. D. 1875, in the said December term, A. D. 1874, of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

THE UNITED STATES OF AMERICA, ON THE RELATION of Matthew Bolles et al., *vs.* CHESTER BADGER ET AL. } Mandamus.

Now come the parties by their attorneys, and thereupon the demurrer of the relator to the answer of the respondents herein is submitted to the court on briefs to be furnished by Monday next.

Afterwards, to wit, on the 22d day of February, A. D. 1875, in the said December term, A. D. 1874, of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

THE UNITED STATES OF AMERICA, ON THE RELATION of Matthew Bolles et al.,
vs.
CHESTER BADGER ET AL. } Mandamus.

The court having considered, and being now fully advised upon, the demurrer of the relators to the answer of the respondents filed herein, sustains said demurrer, and orders that a peremptory writ of
44 mandamus issue, as prayed in the petition, and that the same be made returnable the third day of April next.

Afterwards, on the 3rd day of March, A. D. 1875, in the adjourned March term of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

UNITED STATES OF AMERICA, ON THE RELATION of Matthew Bolles and M. Shepard Bolles, partners in business, under the firm of M. Bolles & Co.,
vs.
CHESTER BADGER, CHARLES E. IVES, LEE Cronkite, Simon Badger, Oliver F. Warriner, and William B. Andress, the supervisor, town clerk, and justices of the peace, constituting the board of auditors of the town of Amboy, in the county of Lee, and State of Illinois. } Mandamus.

This day came the said parties by their respective attorneys, and said relators move that the record entry of the judgment rendered in this cause on the twenty-second day of February, eighteen hundred and seventy-five, be amended in form so as to correctly set forth in full the order and judgment of this court; and it appearing to the court that said record entry i s imperfectly entered, and should be amended in form, it is considered and adjudged by the court that said record
45 be amended in form and spread upon the records of this court now as of the twenty-second day of February, eighteen hundred and seventy-five, one of the judicial days of this court, in manner as follows:

UNITED STATES OF AMERICA, ON THE RELATION of Matthew Bolles and M. Shepard Bolles, partners in business, under the firm of Bolles & Co.,
vs.
CHESTER BADGER, CHARLES IVES, LEE CRONkite, Simon Badger, Oliver F. Warriner, and William B. Andress, the supervisor, town clerk, and justices of the peace, constituting the board of auditors of the town of Amboy, in the county of Lee, and State of Illinois. } Mandamus.

This day came the said relators by their attorneys, Paddock & Ide,

and also said defendants by their attorneys, O'Brien, Barge and Dixon, and, after argument by counsel, it is considered and adjudged by the court that the relators' demurrer to the answer of the defendants to the petition in this cause be sustained; and said defendants, abiding by their said answer, it is thereupon considered and adjudged by the court that said relators have their costs in this behalf expended, amounting to the sum of sixty-six dollars and twenty cents, and have execution therefor, and that a peremptory writ of mandamus issue from this
46 court commanding the said defendants, Chester Badger, Charles E. Ives, Simon Badger, Lee Cronkite, Oliver F. Warriner, and William B. Andress, as the supervisor, town clerk, and justices of the town of Amboy, in the northern district of Illinois, and the legally qualified successor or successors in office to them or any of them, who shall fill said offices respectively on the day hereinafter fixed, by firmly enjoining them, and each of them, that they do meet as the board of auditors of said town of Amboy, in said town, on the thirtieth day of March, A. D. eighteen hundred and seventy-five, the same being the Tuesday preceding the time fixed by law for the next annual town meeting in said town, and that as such board they do then and there audit and allow as charges against said town due to said relators, M. Bolles & Co., the judgments recited in the petition, and recovered by said relators in this court at the May term, eighteen hundred and seventy-four, thereof, against said town, viz: one for eighteen hundred and ninety-one dollars and eighty cents damages and thirty-six dollars and twenty cents costs, and the other for five hundred and fifty-one dollars and sixty-five cents damages and thirty-seven dollars and seventy-five cents costs, together with interest on said amounts of damages at six per cent. per annum from the seventh day of May, eighteen hundred and seventy-four, the date of such recoveries, and that they do then
47 and there make, sign, and certify to, and deliver to and file with, the town clerk of said town a certificate showing an allowance of said judgments, and interest thereon as aforesaid, and costs to the said relators, and that they do and perform all such other acts and things in the premises as the law requires of them, and each of them, to do for the allowance and proper certification of said claims, so that provision may be made for the collection thereof by the levy of taxes in said town, and that all and singular the matters for the complete performance without delay or hindrance of the foregoing according to the exigency of the law, they and each of them, as such board of auditors and members thereof, shall do and execute on said thirtieth day of March, A. D. eighteen hundred and seventy-five; and how they shall have executed said peremptory writ, said defendants shall make it appear by due return thereof into this court on or before the third day of April, A. D. eighteen hundred and seventy-five.

And afterwards, to wit, on the 10th day of March, A. D. 1875, said defendants filed in said clerk's office their bond in error, in said-entitled cause; which said bond is in the words and figures following, to wit:

Bond in error.

In the Supreme Court of the United States.

THE UNITED STATES, EX REL. MATTHEW Bolles and M. Shepard Bolles,
vs.
48 CHESTER BADGER, CHARLES E. IVES, Simon Badger, Oliver F. Warriner, Lee Cronkrite, and William B. Andruss, plaintiffs in error.

Know all men by these presents that we, Chester Badger, Charles E. Ives, Simon Badger, Oliver F. Warriner, Lee Cronkrite, and William B. Andruss, Josiah Little, Jacob Kline, Curtis M. Butler, Lemuel Bourne, Isaac Edwards, Henry Chapin, John B. Felker, John C. Church, Rufus H. Mellen, and Curtis M. Butler, are held and firmly bound unto the United States of America, for the use and benefit of Matthew Bolles and M. Shepard Bolles, in the sum of five thousand dollars, to be paid to the said party of the second part, for the use of said Matthew Bolles and M. Shepard Bolles, their heirs, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seals, and dated this fourth day of March, A. D. 1875.

Whereas the above-named Chester Badger, Charles E. Ives, Simon Badger, Oliver F. Warriner, Lee Cronkrite, and William B. Andruss have prosecuted a writ of error to the Supreme Court of the
49 United States to reverse a judgment for the issuance of a peremptory writ of mandamus, rendered in the above-entitled suit by the circuit court of the United States in and for the northern district of Illinois:

Now, therefore, the condition of this obligation is such that if the above-named Chester Badger, Charles E. Ives, Simon Badger, Oliver F. Warriner, Lee Cronkrite, and William B. Andruss shall prosecute their said writ of error to effect, and answer all damages and costs if they shall fail to make good their plea, then this obligation to be void; otherwise the same shall be and remain in full force and virtue.

R. D. BADGER.	CHAS. E. IVES.
CHAUNCY D. SEARS.	SIMON BADGER.
R. W. GRIDLEY.	OLIVER F. WARRINER.
WM. GEDDES.	LEE CRONKRITE.
R. CUTHBERTSON.	WILLIAM B. ANDRUSS.
CHAS. W. BELL.	LEMUEL BOURNE.
JAMES SHEA.	JACOB KLEIN.
JEROME B. HUSSEY.	ISAAC EDWARDS.
ROBERT MERIGOLD.	JOSIAH LITTLE.
CHARLES E. IVES.	HENRY CHAPIN.
EUGENE B. STRICKLAND.	JOHN B. FELKER.
T. J. BERESFORD.	JOHN C. CHURCH.
GEO. R. KEELING.	RUFUS H. MELLEN.
CHESTER BADGER.	CURTIS M. BUTLER.

Signed, sealed, and delivered in presence of—
A. H. WOOSTER.

50 Approved.

H. W. BLODGETT, *Judge.*

(Endorsed:) Filed March 10, 1875. Wm. H. Bradley, clk.

51 NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the circuit court of the United States for the northern district of Illinois, do hereby certify the above and foregoing to be a true, correct, and complete transcript of the record of all the proceedings had in said court in the cause wherein the United States of America, on the relation of Matthew Bolles and M. Shepard Bolles, in business under the firm of M. Bolles and Co., are the petitioners, and Chester Badger et al. are the respondents, as the same appears from the files and records of said court now remaining in my custody and control.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at my office, in Chicago, in said district, this 5th day of October, A. D. 1875, and of our Independence the 100th year.

[SEAL.] WM. H. BRADLEY,
Clerk.

52 The United States of America to the judges of the circuit court of the United States for the northern district of Illinois, greeting:

Because in the record and proceedings, as also in the rendition of a judgment, in a plea which is in the said court before you, between the United States of America, on the relation of Matthew Bolles and M. Shepard Bolles, plaintiffs, and Chester Badger, Charles E. Ives, Lee Cronkrite, Simon Badger, Oliver F. Warriner, and William B. Andrews, constituting the board of auditors of the town of Amboy, defendants, a manifest error hath happened, to the great damage of the said Chester Badger, Charles E. Ives, Lee Cronkrite, Simon Badger, Oliver F. Warriner, and William B. Andrews, constituting the board of auditors of the town of Amboy, as by their complaint appears; and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf: You are hereby commanded, if judgment be therein given, that then, under
53 your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief-Justice of the Supreme Court of the United States, this fourth day of March, A. D. 1875, and of our Independence the 99th year.

[SEAL.] WM. H. BRADLEY,
Clerk of the Circuit Court of the United States for the Northern District of Illinois.

(Indorsed:) Circuit court U. S. northern district of Illinois. The United States, on relation Matthew Bolles et al., vs. Chester Badger et al., board auditors town of Amboy. Writ of error.

54 UNITED STATES OF AMERICA, *ss:*

To the people of the United States, ex rel. Matthew Bolles and M. Shepard Bolles, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October next, pursuant to a writ of error filed in the clerk's

office of the circuit court of the United States for the northern district of Illinois, wherein Chester Badger, Charles E. Ives, Simon Badger, Oliver F. Warriner, Lee Cronkrite, and William B. Andruss are plaintiffs in error, and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief-Justice of
55 the Supreme Court of the United States, this fourth day of March, A. D. eighteen hundred and seventy-five.

H. W. BLODGETT, *Judge.*

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

Sherwood Dixon, being duly sworn, on oath says that on the 23rd day of March, A. D. 1875, he delivered a true copy of the foregoing citation to George O. Ide, one of the attorneys of record of the said defendants in error.

SHERWOOD DIXON.

Subscribed and sworn to before me this 23rd day of March, A. D. 1875.
WM. H. BRADLEY, *Clk.*

(Indorsed:) Chester Badger et als. vs. The United States, ex rel. Matthew Bolles et als. Citation.

56 *Assignment of errors.*

Supreme Court of the United States, October term, A. D. 1875.

CHESTER BADGER ET ALS., PLAINTIFFS IN error,
vs.
M. BOLLES ET AL., DEFENDANTS IN ERROR.

Error to the circuit court of U. S. for N. D. of Illinois.

Now comes the said Chester Badger et al., the plaintiffs in error, by Milton T. Peters & John B. Hawley, their attorneys, and say in the record and proceedings aforesaid there is manifest error in this, to wit:

1st. That the circuit court erred in sustaining the demurrer of the petitioners to the answer of the defendants to the petition for the writ of mandamus against the defendants below, who are the plaintiffs in error.

2d. The said circuit court erred in sustaining said petition, and holding that the said answer thereto was insufficient, and in rendering judgment for the petitioners and against the defendants below.

3. The said circuit court erred in awarding a peremptory mandamus against the defendants below and the plaintiffs in error.

57 4th. The said circuit court erred in rendering judgment against the plaintiffs in error.

By reason whereof, the plaintiffs in error pray that the said judgment may be reversed, &c.

MILTON T. PETERS,
J. B. HAWLEY,
Attys. for Plaintiffs in Error.

(Indorsement on cover:) No. 406. Chester Badger, Charles E. Ives, et al., constituting the board of auditors of the town of Amboy, plaintiffs in error, vs. The U. States, ex rel. Matthew Bolles and M. Shepard Bolles. N. Illinois C. C. U. S. Filed 7th October, 1875.

Supreme Court of the United States,

OCTOBER TERM, A. D. 1876.

NO. 406.

Chester Badger, Charles E. Ives, *et al.* constituting the Board of Auditors of the Town of Amboy, *Plaintiffs in Error.* vs. The United States *ex rel.* Mathews Bolles and M. Shepard Bolles.	In Error to the Circuit Court of the United States for the Northern District of Illinois.

BRIEF FOR PLAINTIFFS IN ERROR

BY

PETERS, ECKLES & KYLE.

MILTON T. PETERS, and
THOMAS J. HENDERSON,
Attorneys for Plaintiffs in Error.

Filed ..... A. D. 1876.

..... *Clerk.*

Republican Print, Princeton, Ill.

Supreme Court of the United States,

OCTOBER TERM, A. D., 1876.

NO. 406.

CHESTER BADGER, CHARLES E. IVES, *et al.*, Constituting the Board of Auditors of the Town of Amboy, Plaintiffs in Error. vs. THE UNITED STATES, *ex. rel.*, Mathew Bolles and M. Shepard Bolles.	In Error to the Circuit Court of the United States for the Northern District of Illinois.

BRIEF AND ARGUMENT FOR THE PLAINTIFFS IN ERROR.

On the 7th of January A. D., 1875, the Defendants in Error, filed in said Circuit Court, their petition for a mandamus against the Plaintiffs in Error, which said petition is set out in *hec verba*, on pages two, three and four, of the printed transcript of the Record.

Said petition alleged, that the petitioners had recovered,

in that court two certain judgments against the town of Amboy, a municipal corporation, under the township organization laws of the State of Illinois.

That the Supervisor, Town Clerk, and Justices of the Peace of the town, constituted a Board of Auditors, not less than three being a quorum, whose duty it was to convene on the Tuesdays before the 2d Tuesday of September, and the 1st Tuesday in April, in each year, to examine and audit town accounts.

That on the 29th of August A. D. 1874, said board of auditors consisted of Chester Badger, the supervisor; Charles E. Ives, the town clerk; Lee Cronkrite, Oliver F. Warrener, Simon Badger, and William B. Andrus, Justices of the Peace of said town.

That petitioners judgment remaining unpaid, they on that day presented to said auditors, a sworn statement that the same were just and unpaid, and demanded that the said board should audit and allow the same; also delivered at the same time, to and filed with the clerk of the said town, a certified copy of said judgments.

That the said board neglected and refused to audit the same, and refused ever since.

That Chester Badger, supervisor; Charles E. Ives, town clerk; Warrener and Andrus, Justices of the Peace, pretended to resign their offices, and would not discharge the duties thereof, but that no other person had been elected or appointed to succeed them; that the other two Justices, Badger and Cronkrite, to defeat the collection of said judgments refused to act as such auditors, or meet and associate with them, the collector and assessor of said town to con-

stitute a Board of Auditors; nor would they fill by appointment said alleged vacancies.

That the acts of the parties aforesaid were to hinder and delay the collection of the judgments, &c.

That by reason of their said acts, petitioners have been unable to obtain the necessary levy and collection of taxes to pay said judgments, and that no provision has been made for the payment thereof, by the said town. Petitioners pray for summons to award a mandamus against said parties to compel them to audit said judgments.

On the 2d of February, A. D. 1875, Plaintiffs in Error filed in said court, their answer to said petition, which said answer is set out in *hec virba*, on pages 6, 7, 8, 9, 10, 11, 12, and 13, of the printed transcript of the record.

Which said answer substantially presents the points relied upon by the Plaintiffs in Error, to obtain a reversal of the judgment of the court below.

Said answer alleges that the respondants had no personal knowledge, that the petitioners had obtained such judgments, they had been informed, that such judgments had been obtained, but did not know whether they were legal and valid or not.

That such judgments, if any there were, were predicated upon certain interest coupons attached to certain bonds purporting to have been issued by the town of Amboy, to aid in the construction of a rail road that had never been built, and for which bonds and coupons no consideration had been received by the town.

Respondants admit said town is a corporation, and that

the board of auditors thereof, are constituted, and their duties such as alleged in the petition, but respondents deny it to be the duty of the town auditors, to examine and pass upon the validity of judgments purporting to have been rendered against the town; they deny that it is their duty to make any certificate in regard to the same.

That by section 6, of article 5, of the township organization law, under which said corporation was created, it is provided as follows, to wit: (Revised Statutes of Illinois of 1874, page 1074.)

"Judgments recovered against a town or against town officers, in actions prosecuted by or against them, in their name of office, shall be a town charge and when collected shall be paid, to the person or persons, to whom the same shall have been adjudged."

Respondents insist that they had not by said section, or any other provision of the law, the legal right to revise or review judgments against the town, nor would any action of theirs, as town auditors, add to the binding force or obligation of a purported judgment against the town.

That the action of the town clerk could not be influenced by any decision of theirs; but that it would be the duty of such clerk to certify all such valid judgments to the county clerk, with the other indebtedness of the town, without regard to the direction of the town auditors.

Respondents admit that the duty of the town clerk is to make returns, and that taxes are to be levied as alleged in said petition.

Respondents admit that on the 29th of August A. D. 1874, they were the town auditors of said town, but do not

admit that the said purported judgments were due and unpaid and still belonged to the petitioners; of this they had no knowledge, then or since, and are unable to say whether any such valid judgments exist.

They admit petitioners delivered sworn statements to them, and filed certified copies of said purported judgments, in the town clerk's office as alleged in the petition.

They did not examine such copies in the town clerks office, because the petitioners did not request it, but asked that the judgments be allowed on their sworn statements.

Further if respondents had examined such copies of the purported judgments, they would have been unable to decide on their validity, they were not competent, and it was not their duty to do so, the whole matter was without their jurisdiction, and about which the board of auditors had nothing to do. Respondents admit they neglected and refused to audit said purported judgments, or to take any steps for the payment of the same.

Respondents admit that after the presentation of the aforesaid, but upon the same day, to-wit, the 29th of August A. D. 1874, the said Chester Badger, supervisor, and Warrener and Andrus, Justices of the Peace, resigned their respective offices.

That on the 31st of the same month, Ives, the town clerk resigned his office.

That by section 4 of article 10, of the township organization act (Revised Laws of A. D. 1874, page 1079), it is provided as follows, to-wit: "The Justices of the Peace of a "town, may for sufficient cause shown to them, accept the

"resignation of any town officer of their town, and when-
"ever they shall accept any such resignation, they shall
"forthwith give such notice thereof to the town clerk of
"the town, who shall make a minute thereof upon the town
"records, provided that in towns having more than two
"Justices of the Peace, such resignation may be accepted by
"any two of them."

That the said Chester Badger, Ives, Andrus and Warrener, did resign their respective offices, under and by virtue of said section, that said resignations were made to and accepted by Cronkrite and Simon Badger, Justices of the town who forthwith gave notice thereof to the town clerk, of the resignation of said Chester Badger, Andrews and Warrener, which said clerk made a minute thereof, upon the records of said town before he resigned his office.

The resignation of said Ives, the town clerk, was likewise duly accepted, on the said 31st day of August, by said remaining two Justices of the Peace, and notice thereof entered upon the town records.

Whereby said Chester Badger, Ives, Andrus and Warrener, ceased to be town officers and members of the board of auditors.

Respondents deny that said resignations were to evade their duty in the premises, they had no duties to perform in the premises; the records in the town clerks office show the resignations were not for any such purpose; other and sufficient causes were given to the two Justices who accepted their resignations, such causes are of record, and embrace a pressure of business, poor health, &c.

That the causes being deemed sufficient by the two Jus-

tices, aforesaid, and they having accepted the resignations as they had the right to do under the statute, their decision is conclusive of the question and is not subject to review by any court; no such review being authorized by statute.

Respondents insist that all the acts aforesaid, were in good faith, and that thereby they ceased to be town officers, they admit that no successors have been elected or appointed, and that the remaining two Justices of the Peace, will not act as town auditors, or associate with them, the collector and assessor of said town, nor have they filled said vacancies by appointment.

The reasons therefore, are: 1st that the resigning officers having ceased to be officers, of such town, before the 1st Tuesday in September, A. D. 1874, the time fixed by law for the meeting of such board; the said two remaining Justices of the Peace, had no legal right to act as such board, or to associate with them, said collector and assessor.

That by section 2 of article 13th, of the township organization act, it is provided as follows, to-wit: "In case of the absence, of any or either of the said officers, or their failure to attend any meeting of the board, those attending may associate with them, the collector or assessor, of said town or both, in the place of any absence or absentees, as the case may be, who shall act for the time being as members of such board."

There being no such town officers at the time of such meeting, they were none absent, consequently the said two Justices could not call in the assessor or collector; and as three were necessary to constitute the board, the two could not act.

2d. The law did not require the two Justices to fill such vacancies, but only made it lawful, if they chose so to do, the statute being as follows, to-wit: (Section 2d, article 10, of said act.) "Whenever a vacancy shall occur from any "cause, it shall be lawful for the remaining officers, &c., to "fill any vacancy thus occurring, &c."

The two Justices did not fill such vacancies in the town offices, because they were not requested so to do, by the petitioners or their attorneys, nor any of the citizens or inhabitants of the town.

It would have been impossible to fill said vacancies, no person in said town would have accepted any such appointment, as the avowed object would have been, as is well known, to thereby enforce the collection of said judgments; which were an unmitigated fraud and swindle upon the town. Said two Justices' action was not for the purpose of defeating the collection of said judgments, their action was such as the law required, and it was not possible for them to have done otherwise.

Respondents deny that they acted in collusion, to hinder and delay said purported judgments.

They deny said petitioners had any just claims against said town, or that respondents had, or could delay the collection of said purported judgments.

Respondents deny that it was their duty to audit and certify said judgments, any more than it is their duty to allow and certify moneys authorized to be raised by a vote of a town meeting, or any sum directed by law to be raised for any town purpose.

They insist the statute only required them, as such board

of auditors, to examine and pass upon accounts and charges, which had not been audited and allowed by any other tribunal.

That their business was not to revise the decisions of other tribunals, who had passed upon and desided the validity, of purported claims and charges against the town. They claim it was the duty of the town clerk alone, (if any one) to have certified said purported judgments, as having been allowed by this court.

That no other authority was required to authorize the clerk to so certify. if the judgments were valid.

Respondents deny that it was the duty of respondents to to audit said judgments.

They deny that by reason of the acts aforesaid of the respondents, the petitioners have been unable to obtain the necessary levy and collection of taxes, to satisfy said purported judgments.

That in fact, petitioners claims were not presented to the town officers, until the 29th of August, A. D. 1874, when it was too late for the town clerk to have certified to the county clerk the same.

That by the Revenue Law of this State, then and now in force. Revised Laws of the State of Illinois, of 1874, page 878, section 122, it is provided as follows, to-wit: "The "proper authorities of towns, townships, districts, and in- "corporated cities, towns and villages, collecting taxes un- "der the provision of this act, shall annually, on or before "the 2d Tuesday in August, certify to the county clerk the "several amounts, which they severally require to be raised

"by taxation anything in their respective charters, or in "acts heretofore passed by the General Assembly of the "State, to the contrary notwithstanding."

Petitioners purported judgment not having been presented on or before the 2d Tuesday of August, A. D. 1874, could not be embraced in the town clerks certificate for that year.

The town clerks certificate had been already delivered to the county clerk, when petitioners presented their claims, and before another certificate could be presented, so as to embrace petitioners claim, the office of the town clerk would have expired by legal limitation.

Respondents admit that no provision has been made, to pay said purported judgments.

That the auditor of the State had certified the interest coupons, upon which the judgments were founded for taxation, but the collection of such taxes had been perpetually enjoined, by the circuit courts of Lee and Bureau counties, Illinois, which said decrees are still in full force.

Respondents deny all fraud, &c., and deny all the other allegations in the petition.

Annexed to the petition are sworn statements, of the amounts alleged to be due on said purported judgments, but no copy of such judgments, nor is there anything appearing in the record, to prove that such judgments had been recovered, or that such judgments were legal and valid claims against said town.

On the 8th of February, A. D. 1875, the petitioners filed their general demurer to respondents answer, which demurer

was sustained by the court, and the answer adjudged insufficient.

On the 3d of March, A. D. 1875, the court awarded a peremptory mandamus against the Plaintiffs in Error, commanding them as the board of auditors, of said town, to audit and certify said purported judgments, which final judgment of the court is set out in *hec virba*, on pages 16 and 17, of the printed transcript of the record.

The respondents, the Plaintiffs in Error, sued out a writ of error to this court, and now assign for error herein.

1st. That circuit court erred, in sustaining the demurer of the petitioners to the answer of the Defendants, to the petition for the writ of mandamus against the Defendants below, who are the Plaintiffs in Error.

2d. The said circuit court erred in sustaining said petition and in holding the said answer thereto was insufficient and in rendering judgment for the petitioners and against the Defendants below.

3d. The said circuit court erred in awarding a peremptory mandamus against the Defendants below, the Plaintiffs in Error.

4th. The said circuit court erred in rendering judgment against the Plaintiffs in Error, for costs, &c. By reason whereof the Plaintiffs in Error pray that the said judgment may be reversed, &c.

Plaintiffs in Error insist that the judgment of the court below should be reversed because, 1st, that they did not commit any wrong in refusing to audit the purported judgments of the Defendants in Error, even it they had at that time constituted the board of auditors.

That as such board of auditors they had no jurisdiction, to adjudicate upon judgments rendered by the circuit court of the United States.

That if such judgments had been rendered, and were legal and valid, they were conclusive, and not subject to review or revision by the board of auditors. That the decission of such board would confer no authority upon the town clerk, to certify such purported judgments to the county clerk, to levy taxes to pay the same.

That the action of the town clerk in the premises, could in no wise be controlled by the action of said board.

That the law required him, to so certify such judgments if they were valid, without any sanction of said board.

That therein the clerk was independant of the board.

That the clerk was guilty of no default in not so certifying, because such claims had not been presented, until after the time had expired,as fixed by the statute, for the clerk to file certificates of town indebtedness with the county clerk, to levy taxes for the year A. D., 1874; and said town clerk had in fact, before then, made and filed with the county clerk, his said annual certificate for taxation.

No other certificate could be filed, until the second Tuesday in August, A. D., 1875, before which time the office of said town clerk would expire by legal limitation. So there had been no default on the part of any of the members of said board.

Yet the circuit court not only awarded a peremptory mandamus against respondents, but also taxed the costs of the mandamus proceedings against the Plaintiffs in Error, which is not only illegal but also unjust.

2nd. Said judgment is erroneous in awarding a mandamus, against the Plaintiffs in Error, to compel them as a board of auditors, to audit said judgments; and also taxing the costs of the proceedings against the Plaintiffs in Error: because before then, on the 29th, and 31st of August, A. D., 1874, four of said respondents, to-wit: Chester Badger, Ives, Warrener and Andrus, had ceased to be members of said board, and therefore were not subject to the order of the court in the premises; they had resigned their offices, and their resignations had been accepted, as the statute provided, and their said respective offices were vacant.

It will be insisted by the Defendants in Error, that said four respondents still retained their respective offices, notwithstanding their resignations and acceptance thereof in the manner prescribed by the statute, because of the following provision in the Township Organization Law, found on page 1078 of the Revised Statutes of Illinois, of A. D., 1874, Section 92, Article 9, section 9; "Term of Office:" "Town officers, except as otherwise provided, shall hold "their office for one year, and until others are elected or "appointed in their places, and are qualified."

But it is "otherwise provided" by the statute, in cases of resignation, death, or removal; as provided in the subsequent article 10—1st, 2nd, 3d and 4th sections thereof.

The first section of said article 10 provides: that death, resignation, or removal from the town, shall create a *vacancy* in such offices, and that such vacancies may be filled by appointment.

The claim of the Defendants in Error, that there was no vacancy, in such offices, by the accepted resignations afore-

said, is in conflict with the statute, and article 10 of the Township Organization Law.

It there were no vacancy, as contended by the defendants in error, then it was not possible for the remaining town officers to make appointments, to fill the places of such resigned officers.

The statute allows such appointments to be made only in case of *vacancies.*

Said article 10 provides that vacancies shall immediately occur, upon the acceptance of the resignations, or in case of death, or removal from the town; and there is no intimation whatever, in said article 10, which is subsequent to article 9, section 9, relied upon by the Defendants in Error, that the vacancy shall not occur immediately; or that the same will not take effect until other officers be appointed in their stead; and if there was any conflict in the two articles, section 10 being the last one, would govern.

If section 9, of article 9, governs or applies in regard to offices vacated by death, resignation, or removal, this absurdity would occur; that the prior incumbents, notwithstanding their death, removal from the country, or accepted resignations, would remain in office for one year, *and until others were elected or appointed in their places, and qualified,* and be subject to all responsibilities of such offices, and liable for all the penalties of the non-performance of the duties; which could not have been the intention of the statute.

The proper construction of the two articles taken together is this, town officers shall hold their offices for one year, and till others are elected and appointed in their places and

qualified, except such offices be vacated by death, resignation, or removal from the town.

Two of the resigning officers were justices of the peace. Revised Statutes of Illinois, 1874, page 637, section 3, provides that: "When a *vacancy* occurs in the office of a "justice of the peace, or constable, by death, resignation, "removal from the town or precinct, or other cause; if the "unexpired term exceeds one year, his office shall be filled "by special election." Though the statute expressly provided that a vacancy should occur in the office of justice of the peace, by resignation, without any other qualification or other contingency, yet the circuit held that said two justices were still in office, and no vacancy had occurred, notwithstanding their resignations.

Although the respondents aforesaid had acted in good faith, the circuit court not only unjustly awarded costs against them, but ordered them by mandamus to do, what they had no legal right to do.

3d. Said judgment is erroneous, because there was no proof furnished that the petitioners in the circuit court had any judgments against the town of Amboy, that were legal and valid, so as to create an indebtedness against said town; no copy or transcript of said judgments, was, or is attached to the petition, answer, or any of the papers in the cause; said judgments were denied in respondents answer.

The case was decided by the circuit court and judgment rendered, solely upon the petition and answer, on general demurrer to respondents answer; no proof was offered to sustain the allegations of the petition, or rebut the denials of the answer.

Yet in the absence of any proof whatever, the court ordered the respondents, to audit said purported judgments, and rendered judgment for costs against the Plaintiffs in error, as individuals in their personal capacity, which was illegal and unjust.

4th. The petition having been substantially denied by the answer, and no proof adduced by the petitioners, any judgment against respondents was unauthorized.

5th. The law, as well as the facts, were with the Plaintiffs in Error, and judgment should not have been given against them.

For these reasons Plaintiffs in Error confidently insist, that the judgment of the circuit court against them, should be reversed, and the application of the petitioners dismissed.

MILTON T. PETERS,

AND

THOMAS J. HENDERSON,

Attorneys for Plaintiffs in Error.

IN THE

UNITED STATES SUPREME COURT.

OCTOBER TERM, A. D. 1876.

CHESTER BADGER, THE SUPERVISOR, CHARLES E. IVES, THE TOWN CLERK, LEE CRONKRITE, SIMON BADGER, OLIVER F. WARRINER and WILLIAM B. ANDRUSS, THE JUSTICES OF THE PEACE, constituting the Board of Auditors of the Town of Amboy,

Plaintiffs in Error,

v.

UNITED STATES OF AMERICA, EX REL. M. BOLLES & CO.,

Defendants in Error.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF FOR DEFENDANTS IN ERROR.

GEORGE O. IDE,
Attorney for Defendants.

CHICAGO:
BULLETIN PRINTING COMPANY, 112 MONROE STREET.
1876.

Supreme Court of the United States

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v.

UNITED STATES OF AMERICA, EX REL. M. BOLLES & CO., *Defendants in Error.*

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF FOR DEFENDANTS IN ERROR.

STATEMENT.

May it please the Court:

The question to be settled in this case arises upon a demurrer to the answer, which the plaintiffs in error filed in the Circuit court in reply to the petition of the relators, M.

Bolles & Co., for a writ of mandamus to enforce the collection of two judgments at law, which the relators had recovered in that court against the town of Amboy.

The demurrer of the relators was sustained by the Circuit court, and the defendants to the suit having abided by their answer, judgment was rendered on the demurrer, and an order was entered by the court for the issuing of a peremptory writ of mandamus, according to the prayer of the petition. To reverse this judgment and order this writ of error is prosecuted.

The procedure in this case, as to the form of pleadings and form of judgment, is in conformity with the statute of Illinois, concerning "Mandamus." (Revised statutes of Illinois, p. 690, in force July 1st, 1874.) This statute dispenses with any alternative writ, substituting the ordinary process of summons, and providing that cause why a peremptory writ should not be issued shall be shown by answer to the petition; that the petitioner may demur or reply to the answer, and that on judgment upon the demurrer in favor of the petitioner he may recover costs, and that a peremptory writ may be granted.

On the 7th day of January, 1875, the relators filed in the Circuit court for the Northern District of Illinois, their petition for a writ of mandamus against the plaintiffs in error, alleging that on May 7th, 1874, they recovered, in said court, two judgments at law against the town of Amboy in said district, one for $1,891.80 damages, and $36.20 costs, and the other for $551.65 damages and $37.75 costs, (Printed

Record, p. 2, folio 4), and so fully appearing on the records of said court.

That said town is now, and ever since the year 1860, has been a municipal corporation, created and existing under the township organization laws of Illinois. (Rec., p. 2, fol. 5.)

That by the revised township law, in force March 4th, 1874, the supervisor, town clerk and justices of the peace constitute a board of auditors, which shall consist of at least three persons, and that it shall be the duty of said board to meet at the town clerk's office for the purpose of examining and auditing town accounts and charges, semi-annually, on the Tuesday next preceding the first Tuesday in April, and on the first Tuesday in September. (Rec., p. 2, fol. 5.)

That by Section 6 of Article 5 of said law, judgments against the town are made town charges; and by Article 13 it is made the duty of said board of auditors to examine and audit all town charges against their town, and to make a certificate, to be signed by them, showing the nature of the claim allowed, its amount, and to whom allowed, and to cause such certificate to be filed with the town clerk, for the purpose of having the same certified to the county clerk of the county in order that the amounts certified may be levied by the county clerk and collected by taxation, in the manner prescribed by the revenue laws of the State. (Rec. p. 3, fol. 6.)

The petition further alleged that on the 29th day of August, 1874, the board of auditors of the town of Amboy consisted of the plaintiffs in error, as the supervisor, town clerk and justices of the peace of that town; that on that

day, the said judgments and costs remaining unpaid, the relators demanded of said board of auditors, and each member thereof, that they should audit and allow relators, said judgments and costs, with interest, at their semi-annual meeting on the first Tuesday in September, 1874, and take the necessary steps at said meeting to allow and have the same certified to the town clerk of said town, so that provision might be made for the payment of said claims according to law, and that the board should meet on said first Tuesday for said purposes; the petition also alleged that at the time of making this demand, the relators furnished the board with sworn statements, in due form, of the relators' said claims against the town, and delivered to the town clerk, to be by him filed in his office, copies of the judgments, duly certified by the clerk of the United States Circuit court, under the seal of that court. (Rec., p. 3, fol. 7.)

The petition further alleged, that this demand was not complied with, and that said board of auditors refused and neglected, and still refuse and neglect, to comply with the same, and to audit and allow said claims, and to take any steps whatever toward providing for their payment; that after the said demand had been made upon them, Chester Badger, the supervisor, Ives, the town clerk, and Warriner and Andruss, two of the four justices, for the purpose of evading their duty in the premises, pretended to resign their said offices, but whether they had, in fact, resigned or not, the petition alleged that no other persons have been elected or appointed to succeed them in their said offices, and the remaining two justices of the peace, Simon Badger and Cronk-

rite, wilfully and designedly, and for the purpose of defeating the relators in the collection of said judgments, will not act as such auditors, or meet and associate with them to constitute the board of auditors, the collector and assessor of said town, as by law they are authorized to do, nor fill by appointment, as by law they are empowered to dc, any of said alleged vacancies in the offices of supervisor and town clerk. The petition further averred, that said acts, omissions and refusals of said auditors have been done by collusion with each other, and with the design to delay and hinder the petitioners in the collection of said judgments, and to defraud the petitioners out of their said claims against said town. (Rec. pp. 3–4, fol. 8.)

The petition further alleged that it was and is the duty of said board of auditors to meet, audit, allow and certify as aforesaid to said claims; that by reason of the premises and the wrongful acts and refusals of said Chester Badger and his said associates, the petitioners are and have been unable to obtain the necessary levy and collection of taxes in said town, for the purpose of satisfying said judgments; that no provision whatever, or levy of taxes, has been made by said town, or otherwise, to pay said judgments, nor has the town appropriated any funds for such purpose. (Rec. p. 4, fol. 9.)

The petition prayed that the plaintiffs in error constituting the said board of auditors of the town of Amboy, be summoned to appear and show cause why a peremptory writ of mandamus should not issue against them to meet, and audit, and allow the said judgments and costs against said town, and certify the same in the manner provided by said act of March 4th, 1874, and to do and perform all such acts in the premises as the law requires. (Rec. p. 4, fol. 10.)

THE ANSWER.

On February 2nd, 1875, the plaintiffs in error appeared and filed in said Circuit court their answer to the petition, admitting the substantial allegations of the petition, but setting up various excuses for their alleged neglect of duty.

The allegations in the petition, admitted in direct terms, are the following:

1st. That they are informed that the petitioners did obtain the judgments described in the petition, but they have no personal knowledge of it (Rec. p. 7, fol. 16–17); admit that it was well known in the town that petitioners had recovered their judgments. (Rec. p. 12, fol. 29.)

2nd. That the said town of Amboy is and has been a municipal corporation under the township organization laws of Illinois. (Rec. p. 7, fol. 17.)

3rd. That by the act of March 4th, 1874, the supervisor, town clerk and justices of the peace of the town constitute a board of auditors; that it is the duty of this board to meet, as alleged in the petition, at the town clerk's office for the purpose of examining and auditing the town accounts, and to audit all claims and charges against the town (Rec. p. 7, fol. 18); that it is the duty of the town clerk to make returns to the county clerk as alleged in the petition; and that by article 13 of the township organization statute, it is provided that the money necessary to defray the town charges shall be levied on the taxable property of the town, in the manner provided by the revenue act. (Rec. p. 8, fol. 20.)

4th. That on the 29th day of August, 1874, the board

of auditors of said town of Amboy consisted of the plaintiffs in error; that on that day the demand alleged in the petition was made upon said board and each member of it, accompanied with the sworn statements described in the petition, and that duly certified copies of said judgments also were then delivered to the town clerk, said Ives, to be by him filed in his office; that these demands and statements were in writing, and copies of which are made exhibits to the answer. (Rec. p. 8, fol. 21; p. 14, fols. 38, 39, 40.)

5th. That the plaintiffs in error, the then board of auditors of said town, refused and neglected, and still refuse and neglect, to comply with said demands to audit and allow said judgments, or to take any steps whatever toward providing for their payment, believing then, as they do now, that it was not their duty to do so. (Rec. pp. 8–9, fol. 22.)

6th. That after the demand was made, Badger the supervisor, Ives the town clerk, and Warriner and Andruss, two of the justices of the peace, attempted to resign their said offices; that no other persons have been elected or appointed to succeed them, and that the remaining two justices will not act as auditors, or meet and associate with them to constitute a board of auditors, the collector and assessor of said town, nor have they filled by appointment any of said alleged vacancies. (Rec. pp. 9–10, fol. 23–26.)

7th. That no provision whatever or levy of taxes has been made by said town, to pay said judgments, nor has the town appropriated any funds for such purpose. (Rec. p. 12, fol. 35.)

The excuses set up in the answer by the plaintiffs in error for their refusal to act, are in substance:

1st. That the judgments were rendered upon causes of action, which the auditors deemed invalid, and in suits which the town did not defend, because they were advised that under the decisions of the United States Supreme court no defense would be allowed (Rec. p. 7, fol. 17), and that the causes of action were held by bona fide assignees, whose right to such judgments could not be disproved by the town. (Rec. p. 11, fol. 29.)

2d. That it is not the duty of the board of auditors to audit and allow, as a town charge, the judgments rendered in courts against the town, because that would be to revise the proceedings of the court and to pass upon the validity of its judgments; that judgments, by force of section six, article five, of the township law, are not such town charges as can be audited and certified to by the board of auditors; and that it is the duty of the town clerk to certify judgments to the county clerk, whether directed to do so or not, by said board. (Rec. pp. 7–8, fol. 18–19.)

3rd. That certified copies of the judgments, like those delivered to the town clerk and filed in his office, were not served on the board nor were they requested to examine the certified copies; that they did not examine said certified copies to determine whether they would comply with the demand; and if they had examined them they would not have been competent to decide on the validity of said judgments, nor was it their duty so to have done; that the entire matter was without their jurisdiction. (Rec. p. 8, fol. 22.)

4th. That the supervisor, town clerk, and two of the justices resigned by reason of the pressure of business and not for the purpose of evading their duty; that having resigned they are not such officers and are not required to act; that the two other justices did not fill the alleged vacancies because the law did not require them to do so; they did not associate with them the assessor and collector as a board of auditors and audit the judgments, because the other town officers were not absent, they having power to associate the collector and assessor only in cases of absence and not in cases of vacancy; and that the alleged vacancies could not be filled, because the people in the town were opposed to the collection of the judgments. (Rec. pp. 9–10–11, fol. 24–25–26–27–28–29.)

5th. That it was not the duty of the board of auditors to meet, audit, allow, and certify to the said judgments, because they insist that the statute only required them, as such board, to examine and pass upon accounts and charges which had not been audited by any other tribunal. (Rec. p. 11, fol. 31.)

BRIEF.

I.

It is sufficiently clear from the answer and the analysis of it made in the statement to this brief, that the material allegations of the petition are substantially admitted, most of them in direct terms, some through an insufficient statement of the facts, and others by a failure to traverse the allegations of the petition. What the answer does not deny in specific terms must be held to be true (*Von Hoffman v. City of Quincy*, 4 Wallace 548). The answer to the petition must, like the return to an alternative writ—in the place of which, under the present Illinois statute, the petition now stands—be certain and specific, and show its defenses by facts well pleaded. In mandamus, every intendment is made against a return, which does not answer the important facts.

This rule is clearly stated by the Supreme court of Illinois in *People ex rel. v. Ohio Grove Town*, 51 Illinois 195, as follows: "The alternative writ stands for a declaration, and the return as a plea. Like other pleas it must state facts positively and distinctly. The return should set out the facts fully, so as to enable the relator to traverse them. It is not sufficient to aver conclusions of law. If facts are not stated, or if insufficiently stated, the plea will be held bad. Greater certainty is required in a return than in an ordinary plea in bar. Tapping on Mandamus, 352, 370; Moses on Mandamus, 210. In the case of *People v. Kilduff*, 15 Illinois 492.

it is so held that every intendment would be made against returns which do not answer important facts."

The demurrer to the answer questions its sufficiency as a defense to the prayer of the petition, and under the well-settled rule of pleading, does not admit anything set up in the answer as a defense, which is not well and properly pleaded. (*Gould v. Evansville, etc., R. R. Co.*, 91 U. S. Rep. 536.)

Testing the sufficiency of the answer by the rules above quoted, it is apparent that the answer admits the substantial facts set up in the petition; the recovery of the judgments against the town of Amboy in favor of the petitioners in the Circuit court; a demand on the board of auditors of that town to audit and allow said judgments, on a day fixed by the statute for such auditing, as a preliminary and necessary step to the levy of taxes to pay said judgments; the refusal and neglect of the auditors to comply with the petitioners' demand; the fact that the town of Amboy is governed by the provisions of the Illinois township law, which prescribes the duties and imposes upon the board of auditors the obligation to audit judgments against their town as town charges; the fact that the respondents composed the board of auditors when the demand was made, and that no successors had been appointed or elected to fill the places of those auditors who claimed or pretended to have resigned.

It is stated in the brief of plaintiff in error (p. 15) that the existence of the judgments is denied in the answer. This is not so. There is no such denial in the answer. On the contrary, the respondents only say that they have no personal knowledge of the judgments, but admit that they are informed

that such judgments had been rendered, and then proceed to state certain reasons why they consider the judgments unjust, because, in their opinion, the causes of action upon which the judgments were founded ought not to be collected. They further state that the town did not defend the suits in the United States court, because respondents were advised that their defense would not avail, and because the causes of action were negotiable paper owned by bona fide assignees, against whom the alleged defense could not avail. (Rec. pp. 7–11, fol. 16, 17, 29, 30.) They also admit that duly certified copies of these judgments were lodged with the town clerk, who is a member of the board of auditors, the custodian of the town records, and one of the respondents in this case. (Rec. p. 8, fol. 21.)

This is very far from being a denial of the judgments. On the contrary, these statements show that the judgments were rendered as claimed, and that the respondents, as the officers of the town, were advised beforehand that they had no defense to the suits. This is not good pleading. The answer should either deny or admit the judgments specifically. Again, if the answer means that they do not admit the validity of the judgments this is bad pleading also, because only a conclusion is stated; there is no averment in what respect or for what reason the judgments are invalid, and thus the presumption of law in favor of the jurisdiction of the court and the validity of its judgments is not overcome by any sufficient averment.

In any point of view, the answer wholly fails to traverse the existence of the judgments by any clear and specific averment, and the allegation of the petition concerning the rec-

ord of the judgments in the Circuit court, is therefore admitted to be true.

It is asserted in the answer that the judgments in question are not town charges, within the meaning ot the township organization law of Illinois, and hence that it was not the duty of respondents as the board of auditors of Amboy to audit these judgments. It is admitted, however, in the answer, that the town of Amboy is now and was at the time of the demand, governed by the provisions of the Illinois township law. One of these provisions provides specifically for the auditing of town charges by the board of auditors, and by another provision a judgment against a town is declared to be a town charge. The question, then, is one of law and not of fact.

The provisions of the township organization laws relating to this duty to audit are as follows:

Article 5, section 6, says: "* * * judgments re- "covered against a town, or against town officers in actions "prosecuted by or against them in their name of office, shall "be a town charge, and when collected, shall be paid to the "person or persons to whom the same shall have been ad- "judged."

Revised Stat. Illinois p. 1074, section 50.

THE BOARD OF TOWN AUDITORS.

"SEC. 1. In each town the supervisor, town clerk and "justices of the peace of the town shall constitute a board of "auditors; said board shall consist of no less than three per- "sons, and each person shall cast but one vote.

"SEC. 2. In case of the absence of any or either of the "said officers, or their failure to attend any meeting of the "board, those attending may associate with them the collector "or assessor of the town, or both, in the place of any ab- "sentee or absentees, as the case may be, who shall act for "the time being as members of such board.

"SEC. 3. Said board of auditors shall meet at the town "clerk's office for the purpose of examining and auditing the "town accounts, semi-annually, on the Tuesday next preceed- "ing the annual meeting of the county board, and on the "Tuesday next preceeding the annual town meeting."

[The annual meeting of the county board is required to be held on the second Tuesday in September in each year (see Rev, Stat. p. 311, Sec. 49); and the annual town meeting occurs on the first Tuesday in April. Rev. Stat. p. 1074, Sec. 51.]

"SEC. 4. The board of auditors shall, at the same "time and place as stated in Section 3, examine the accounts of "the supervisor, overseer of the poor (where the town sustains "its own poor), and the commissioners of highways of such "town, for all moneys received and disbursed by them, and "shall also *examine and audit all charges and claims against "their town*, and the compensation of all town officers, except "the compensation of supervisors for county services.

"SEC. 5. The accounts so audited, and those rejected, "if any, shall be delivered, with the certificate of the auditors, "or a majority of them, to the town clerk, to be by him kept "on file for the inspection of any of the inhabitants of the

"town. They shall also be produced by the town clerk at the "next annual meeting, and shall be there read by him.

"SEC. 6. The board of auditors may require any "amount presented, to be verified by affidavit, setting forth "that the same is correct and just, and is unpaid, or, if any "part thereof has been paid, setting forth how much.

"SEC. 7. The board shall make a certificate, to be "signed by a majority of the said board, specifying the na- "ture of the claim or demand, and to whom the amount is "allowed, and shall cause such certificate to be delivered to "the town clerk of said town, to be by him kept on file for "the inspection of any of the inhabitants of said town; and "the aggregate amount thereof shall be certified to the county "clerk at the same time, and in the same manner as other "amounts required to be raised for town purposes, which "shall be levied and collected as other town taxes."

"SEC. 9. The moneys necessary to defray the town "charges of each town, shall be levied on the taxable prop- "erty in such town, in the manner prescribed in the act for "raising revenue for State and county purposes and expenses."

Rev. Statutes pp. 1081, 1082, in force March 4th, 1874.

The answer admits that it is the duty of the board of auditors to audit all claims and charges against the town, and then, with strange inconsistency, asserts that it is not their duty to audit these judgments, because, by so doing, they would be revising the judgments of the Circuit court. The answer also denies that the auditors are to embrace judgments

in their certificate of claims audited, and seems to advance the idea that the town clerk is to certify the amount of such judgments directly to the county clerk for purposes of taxation, without any previous auditing by the board of auditors.

The plain answer to all this is, that the statute is clear and does not justify these assertions. Section 6 of article 5, above quoted, expressly declares judgments to be town charges. Section 4 of article 13, makes it, also, the duty of the board to "*examine and audit all charges* and claims agains their town." Section 7 requires them to make a certificate of the accounts so audited, and to deliver it to the town clerk; and also requires the aggregate amount of their certificate to be certified to the county clerk at the same time, and in the same manner, as other amounts required to be raised for town purposes, which latter embrace appropriations voted at the town meeting under other provisions of the statute.

There is no provision in the township law authorizing the town clerk to certify directly to the county clerk for taxation the amount of judgments recovered against the town, or any other amount, without a previous auditing. The latter clause of section 7, and the other provisions requiring an audit of town charges, expressly show that when money is to be raised by taxation to pay town charges, among which, by force of Sec. 6, Art. 5, judgments are classed, the auditors must first audit the claims, as a necessary preliminary to their certification to the county clerk. When they have been so audited, and the requisite certification is filed with the town clerk, section 4 of article 12 makes it the duty of the town clerk, "annually at the time required by law to certify to the

county clerk the amount of taxes required to be raised for all town purposes." (See Rev. Stat. p. 1081, Sec. 115.) This provision, coupled with the one in section 7, article 13, shows that a certificate of the auditing must be filed with the town clerk, and the town clerk then certifies the aggregate to the county clerk to be raised by taxation.

And this duty of the board to audit these judgments is not discretionary in the sense of leaving it to them to say whether or not the judgments shall be paid, or whether the judgments are just and valid, or not. The judgments have been rendered and their amounts ascertained by the court, and all questions of defense are thus adjudicated, and the town is estopped to deny their validity. The auditing is purely ministerial. This has been often and universally so held.

High on Ex. Remedies pp. 81, 277, 284.
Dillon on Munic. Corp. Secs. 669, 685, 686, 689.
Supervisors v. U. S., ex. rel., 4 Wallace 435.
City of Galena v. Amy, 5 Wallace 705.
City of Olney v. Harvey 50 Ill. 456.

In *Lower, et al., v. U. S., ex rel.*, 91 U. S. Reports p. 539, this court said in a similar case:

"It is enough to know that the writ is an appropriate "and efficient remedy to compel town auditors to audit a "charge against the town, when their action is necessary to "determine the amount of money to be raised by taxation. "In Illinois an ordinary execution does not issue on such a "judgment, but the corporate authorities, on refusal to pay, "can be required to levy a tax for the purpose, when the "board of auditors have certified that the charge against the

" town is a proper one. The relators took the necessary " steps to have this certificate made, but the plaintiffs in " error only allowed a small portion of the balance due on " the judgment, without any legal excuse for not auditing " the residue. They admit in their answer the existence of " the judgment, and the amount due thereon, and are not at " liberty to question the liability of the town to pay it. It " does not differ, so far as they are concerned, from one ob- " tained against the town for ordinary charges. *Auditing it* " *so that provision may be made for its payment by taxa-* " *tion, is a mere ministerial act not involving the exercise of* " *official discretion, the performance of which can be covered* " *by mandamus.*"

Auditing the judgments does not mean that the auditors are to pass upon and judge of their validity nor to question them in any sense, but to receive the evidence of their existence, and if the same have not since their rendition been paid or extinguished, to provide for their payment by taxation in the mode pointed out by the township law. The assertion in the answer that the auditors have nothing to do with these judgments because their action would be virtually revising the judgments of a court, is an evasion, since there may possibly occur questions as to whether the whole or some part of the amounts recovered have not been already paid by taxation, and to whom does this question belong to decide, if it does not to the auditing officers of the town? They are the " corporate authorities " of such a municipality, as held in *C. D. & V. R. R. Co. v. Smith*, 62 Illinois R. 268, and empowered to levy taxes for the payment of the debts of the town. The statute

of Illinois imposes upon them the duty of auditing and allowing the judgments in question. The auditing is a necessary part of the machinery to set in motion in order to levy taxes to provide for the payment of these judgments.

Mandamus has always been held to be a proper remedy to compel *town auditors* to audit a claim against a town.

People ex rel. v. Town Auditors, 53 Barbour 555.
Same case, 38 Howard Prac. R. 23.

Taxation is necessary, because in Illinois an execution can not issue for the collection of a judgment against a municipal corporation. The only remedy is to require the corporate authorities to levy a tax to pay the judgment.

City of Chicago v. Halsey, 25 Ill. 595–598.
Elrod v. Town of Bernadotte, 53 Ill. 374.
Town of Odell v. Shroeder, 58 Ill. 353.
City of Bloomington v. Brokaw, 77 Ill. 194.
Lower v. U. S. ex rel. Marcy, 91 U. S. 539.

The mode of raising the money by taxation is clearly indicated. Under the township and revenue laws of Illinois, in order to levy and extend taxes, there must be certified to the county clerk, by the proper authorities, the amount of money required to be raised by taxation. (Rev. Stat. p. 878, Sec. 122.) The officer, in case of a township, who so certifies, is the town clerk. (R. S. p. 1081, Sec. 115.) But before he can certify, a certificate must be made and filed with him by the town auditors, showing the nature of the claims, charges and demands, audited by them, and it is the aggregate of those allowances that the town clerk certifies up for taxation. (R.

S. p. 1081, Sec. 124.) He is required only to certify what the corporate authorities have audited.

By Sec. 121 p. 1081 it is made the *duty* of the board of auditors to *examine* and *audit all charges* against their town, except certain compensation of certain officers, which is payable out of the county treasury in another mode.

Sec. 125, p. 1082 R. S., specifies what *charges* against a town are, and by Sec. 50, p. 1074, a *judgment* against a town is expressly called and made a *town charge*.

Hence, a judgment against the town being a town charge, by the statute itself, and it being the *duty* of the board of auditors to audit *all* town charges, and the claims which the auditors were demanded to audit in this case being judgments against their town, it follows that the excuse set up in the answer in this regard for not auditing is wholly untenable.

Respondents do not claim that any portion of the judgments have been paid or provided for. On the contrary, they admit that no provision for their payment has ever been made. (Rec. p. 12, fol. 35.) A feeble excuse is made that they were not able to decide whether the petitioners had any valid judgment, because a certified transcript was not served on each member of the board, but they admit, that duly certified transcripts of these judgments were delivered, at the time the demand to audit was made, to the town clerk, who is a member of the board, and is the custodian of the records and papers of the board. (Rec. p. 8, fol. 21–22.) There is no statute requiring such transcripts to be served at all. A demand to audit is sufficient. The transcripts were filed with the town

clerk, as evidence of the recoveries and for the information of the board. One such transcript, under the hand of the clerk, and the seal of the Circuit court, so filed, is surely sufficient to inform this board in addition to the sworn statements of the claims. And that this board of auditors knew of the presence of these transcripts at the town clerk's office, which is fixed by law as their place of meeting, is plainly confessed by the tenor of their answer.

Respondents say in their answer that the auditing of the judgments at their regular meeting in September, would have been of no benefit to the petitioners, because the amount audited could not be certified by the town clerk to the county clerk, in season to be raised by taxation for that year.

This assertion is based on the idea, that Sec. 122, of the revenue act, directing certificates of tax levies to be filed with the county clerk, on or before the second Tuesday in August is mandatory, and that a certificate of a subsequent auditing in September, could not be legally sent up for taxation of that year. Even if this were so, it does not present any excuse for not auditing these judgments at the September meeting. The law fixes a certain Tuesday in September, as one of the regular meetings of the board for auditing purposes. If audited then, and the tax could not be collected that year, for the reason given, still the tax could be certified up the next year, in season for the levy of taxes.

But section 122 of the revenue act is not mandatory as counsel supposes. It is now under recent constructions held to be directory only, and that a certificate filed after the 2d Tuesday in August at any time before the tax is extended by

the county clerk is valid, as well as the taxes levied in pursuance of it. Section 191 of the revenue act as amended by the act of 1873 (R. S. Illinois 1874 p. 890, Sec. 191), so provided in effect, the Supreme court of the State in construing that section, saying: "This section cures all defects growing out of the failure to file the certificate on or before the day named in the 122d section. It renders certificates made after that time valid and binding."

Chiniquy v. People, 78 Illinois 575–576.

Buck v. People, 78 Ill. 566.

Thatcher v. People, 9 vol. Chicago Leg. News p. 107.

The revenue act (R. S. p. 880 Sec. 135) fixes the tenth of December as the time for the completion and issuing of the tax books. There was ample time, then, between the meeting of the auditors in September and the issuing of the tax books, for the town clerk to have certified up the amount of these judgments, if the auditors had done their duty in the premises. The provision about the second Tuesday in August, set up in the answer, would have been no impediment, and if it had been, no reason for not auditing at all can be urged with reason, because the auditing must precede the certification of taxes, and that certification could be made in time for the next annual town levy.

Respondents also inveigh in the answer against the causes of action on which these judgments were based. While claiming the town bonds to be illegal for certain reasons alleged, they admit that the town did not defend because the plaintiffs were bona fide holders and purchasers for value, and that as against plaintiffs whatever defenses the town had could

not therefore avail. These are not issuable matters in this proceeding, and because not in issue, these allegations ought not to prejudice the petitioners' rights in this case. The town is estopped to question these judgments. It has been repeatedly settled in this and other courts, in proceedings by mandamus to collect judgments, that the respondents are concluded by the judgment at law, and that they cannot go behind it to raise any question touching the sufficiency of any of the causes of action on which it was rendered. Respondents are not at liberty to question the liability of the town to pay the judgments, as all equities, which may have been supposed to attach to the original debt, are merged in the judgments and cannot be asserted against a mandamus to enforce payment.

Mayor v. Lord, 9 Wallace 409.
Supervisors v. U. S. ex rel, 4 Wallace 435.
Beloit v. Morgan, 7 Wallace 619.
Lower v. U. S. ex rel, 91 U. S. 539.
People v. City of Cairo, 50 Illinois 165.
Thomson v. Lee County, 22 Iowa 206.
Coy v. City Council Iowa City, 17 Iowa 2.

II.

The demurrer to the answer was properly sustained by the Circuit court, aside from the merits of the matter, on the ground of inconsistency, repugnancy, argumentativeness and uncertainty in the statement of the causes set up in the answer in reply to the petition.

The Illinois statute concerning mandamus provides that the petitioner may demur to the answer, and that upon judg-

ment upon demurrer for the petitioner, the peremptory writ may issue. (See Rev. Stat. 1874, p. 691, Secs. 4, 5.)

It is well settled at common law that the several defenses relied upon in the return to an alternative writ must be consistent with each other; since if they be inconsistent or repugnant, the court may quash the entire return and grant the peremptory writ, even though some of the matters stated might be sufficient as an independent return.

High on Extraordinary Remedies, Sec. 463, p. 332,
Sec. 477, p. 342, Sec. 489, p. 351.

When inconsistent causes for not obeying the mandamus are stated in the return, it must be quashed; for, taken as a whole, it is false. The inconsistency or repugnance is a fatal defect.

Angell and Ames on Corporations Sec. 721, p. 729.
Moses on Mandamus, p. 214.
Tapping on Mandamus, side paging 362.

In the case of *The King v. The Mayor, etc., of Cambridge*, 2 Durnford & East 456 (184, 189), the court say: "Where two causes returned to a mandamus are inconsistent, the whole must be quashed, because the court cannot know which to believe, and it is an objection to the whole return. It is like a declaration in which two inconsistent counts are joined; there the plaintiff cannot have judgment."

Also, *King v. Mayor of York*, 5 Durnford & East, 36—44.

No principle of the law of mandamus is better established than that an argumentative return, like any other argumentative pleading, is bad. The facts relied upon should be set forth

clearly and positively, and not by way of argument or inference.

High on Ex. Remedies Sec. 472.
Angell & Ames on Corp. Sec. 721*a*, p. 728.

If facts are insufficiently stated the plea will be held bad. And greater certainty is required in a return than in an ordinary plea in bar.

People ex rel. v. Ohio Grove Town, 51 Ill. 195.

The answer is argumentative in several respects. In one paragraph respondents aver, that the judgments in question "ought not to be held valid, because the same were predicated upon certain interest-coupons, etc.," "which railroad was never built, so that in fact the said town of Amboy failed to obtain the consideration for which said bond and coupons had been issued." (Record p. 7, folio 17.) In another paragraph, respondents enter into a way of reasoning as to their legal right to revise the judgments of a court, and as to the force and effect of their certificate. (Record, pp. 7–8, folio 19.) In another, they quibble about the validity of the judgments, and argue from a hypothesis as to their competency to decide on the validity of the judgments, and allege, by way of inference, that it was not their duty to decide on such validity. (Record, p. 8, folio 22.) In the same paragraph, they allege as an excuse for not complying with the petitioners' demand to audit, their belief that it was not their duty to audit.

In another paragraph, as to the matter of the resignation, an argument is advanced as to the conclusiveness of the decision of certain officers concerning the alleged resignation. (Record pp. 9–10; folio 25.) Following this and in the same

connection, several reasons are advanced in support of their position, all of which are stated in an argumentative manner, with allusions to what the law requires. (See Reasons Record p. 10, folio 26, 27, 28 29, 30, 31, 32 and 33.) In folios 33–34, p. 12 of the Record, an argument is entered into as to the meaning of a certain statute. The argumentative character of this answer appears in all its averments, inferences and reasonings being mingled promiscuously with all the admissions and denials. A mere cursory inspection of the answer discloses this fatal defect in pleading to such an extent, that it is hardly necessary to further point out the objectionable portions in detail.

The answer is also inconsistent and repugnant in the following statements:

1. An excuse is set up for not auditing, that the respondents were unable to decide from the papers served upon them whether the petitioners had any *valid* judgments; that it was not their duty to revise the judgments of a court of record; and that *the board of auditors refused and still refuse* to comply with the demand to audit and allow these judgments, because they believed then, as they do now, that it was not their duty so to do. (Rec. p. 8–9, fols. 20–21–22.)

2. Another excuse or cause set up is, that four of the auditors resigned their offices, after the demand was made, and thus left the board without the requisite quorum. (Rec. p. 9, fols. 24–25.)

The first excuse is inconsistent with and repugnant to the last one. The first one implies from the statement of the refusal at the time of auditing and their subsequent continuance

in refusing, that the respondents constituted the board of auditors, and were such, at the time of filing their answer. This is to be inferred from the averments that they refused and neglected, and still refuse and neglect, to comply with the demand to audit the judgments, or to take any step whatever towards providing for the payment of the same, because they believed then, as they do now, that it was not their duty to do so. In this part of the answer, there is no allusion to any alleged inability to audit for the want of a sufficient number of auditors. The pretended defense is based entirely upon the belief of the board that it was not their duty to audit judgments for the reasons previously assigned.

These two defenses do not stand together. The four of the six members of the board were either in office or out of it. If in office, the subsequent allegation of the resignation of four of them, previous to the meeting, is inconsistent with and repugnant to the averment of their refusal to audit on the ground that it was not their duty as auditors to audit judgments. If, in fact, no action could be had on account of alleged vacancies in the board, then this alone should have been relied upon and not have been pleaded in the same answer with averments showing that the board was full in number, and that their excuse for not auditing was based upon a misapprehension as to their duty in the premises.

For these inconsistencies, and the argumentative and evasive matters pleaded in the answer, it is insisted that the demurrer was properly sustained. And as the respondents did not ask leave to amend but abided by the demurrer, the court did not err, under the rule of pleading, in entering judg-

ment upon the demurrer and in awarding the peremptory writ.

If it be urged, in reply, that the petitioners might have demurred to the obnoxious portions of the answer, and replied to the specific excuses, the answer is that a demurrer and a traverse to the return will not be allowed at the same time.

In New York it has been held that "under a statute regulating procedings in mandamus, which allows the relator to plead to or traverse any or all of the material facts stated in their return, both a demurrer and a plea will not be allowed at the same time. In such case the whole return is to be considered as an entirety, like a count in a declaration. If, therefore, the facts set forth can not be traversed, the relator should demur, and he will not be allowed to dissect the return into as many parts as he sees fit, and plead to some portions and demur to the residue."

Vail v. The People, 1 Wendell 39.

III.

The demurrer also questions the sufficiency of that portion of the answer which alleges the resignation of four members of the board, as an excuse for not auditing the judgments.

The answer admits that on the 29th day of August, 1874, when the relators' demand was served on the board, the respondents were the officers who constituted the auditing board. It shows that immediately after the service of this demand upon them, and only a few days before the time of the regular meeting of the board, each of these four, by a singular coincidence, was suddenly overcome with a pressure of

business to such an extent as to require him to tender his immediate resignation. They deny that they did so for the purpose of evading their duty. As a reason they say, they had no duties to perform, and this they say in the face of the fact that judgments had previously been had against the town, and they had been called upon to audit these judgments. The recording on the town records of their pretended excuse of "pressure of business," does not divest their conduct of its suspicious character. The pretext they set up, when viewed in the light of the circumstances of the case, can be regarded in no other way than that these sudden attempts at resignation were premeditated, and designed only to hinder and prevent the relators from collecting their judgments, and were, therefore, fraudulent acts on the part of these respondents.

The question is, can respondents so evade the duty the law imposes upon them? It was their duty, under the statute, to audit these judgments, so that taxes could be levied to pay them. Can they shirk their duty by a fraudulent resignation?

Section 9, article 9, Rev. Stat. of Illinois, p. 1078, says:

"Town officers, except as otherwise provided, shall hold "their offices for one year, and until others are elected or "appointed in their places, and are qualified."

The answer admits that no successor has been elected or appointed to any one of these respondents, and further asserts, in a manner showing the *animus* of the respondents, that no person in the town will permit himself to be appointed or elected to fill the alleged vacancies. By reference to article 10, Rev. Stat. p. 1079, it will be seen that the power of appointment is vested in the justices, together with the supervisor and clerk,

and that consequently, if these resignations are valid, no appointment can be made owing to the resignations of the supervisor and clerk. The brief of plaintiffs in error claims, that the clause "except as otherwise provided," refers to the provisions of article 10 of the township law. This is not the meaning of this clause. It obviously relates to the duration of the term of office as fixed by statute. There are various town officers, such as justices of the peace, constables and commissioners of highways, whose terms of office are for different periods. Justices of the peace aud constables hold for four years. Commissioners of highways hold for one, two or three years, to be determined by lot. (Rev. Stat., Sec. 16, p. 1068; sec. 3, p. 1070.) Section 1, art. 7 R. S., p. 1075, fixes the term of office of the supervisor, town clerk, assessor and collector, at one year, and until their successors are elected and qualified. It thus appears that the obvious and natural reference of the clause, "except as otherwise provided," is to those other sections of the statute which prescribe different terms of office than one year, for certain town officers.

Section 9, above quoted, construed with other sections bearing upon the subject, evidently means that the town officer is such until a successor is elected or appointed in his place and has qualified. By sections ten, eleven, and twelve of Article 9, R. S. p. 1078, the officer who resigns still keeps the books and papers of his office, and is their custodian until a successor is elected or appointed, and is not obliged to surrender them until such successor demands them. Section 1 of Article 10 contemplates that in case of a resignation, some person shall be appointed a successor, so that the holding of

the office shall be continuous. No provision is made for any hiatus or failure to appoint. The evident intention of the statute is, that a resignation shall take final effect when the appointing power appoints the successor, and not till then. If not so, why is there used in section 9 of article 9 the mandatory language, "Town officers, except as otherwise provided, *shall hold* their offices for one year, *and until others are elected or appointed in their places and are qualified?*"

The town officer, after he has accepted an office, is thus held by the statute in office until a successor is elected or appointed to succeed him. His resignation stands in abeyance, until the appointing or electing authorities act by creating a successor. It is true the term vacancy is used in article 10, but this is to be construed with reference to all the provisions of the statute, and it is contended here that there is nothing in the language used in connection with this term, which disqualifies or prevents the resigning officer from acting as an officer up to the time of the election or appointment of a successor, or which creates and declares an absolute vacancy in the office the moment the incumbent resigns.

This statute was so construed by the Circuit court in the decision of this case, as reported in *U. S. ex rel v. Badger*, 6 Bissell R. p. 308.

If, however, the above is not the correct construction of the statute, another question remains to be considered: Can a municipal corporation place itself in such a position as to be no longer amenable to legal process for the collection of the debts it owes? Can its officers, by fraudulent resignations and refusals to fill the offices pretended to be vacant, so act as to deprive creditors of all remedy?

Can a municipality procure the resignation of the officers composing a board, whose action is essential to furnish the necessary means by taxation to pay the debts of the corporation, and then fail to supply their places for the purpose of defeating such payment? If this can be legally done, then this town by a novel species of bankruptcy stands discharged of its debts, and the federal courts are powerless to enforce the collection of the judgments they render against such a corporation. It has been held by this court, that the Circuit courts cannot enforce such collection by the levy of taxes through the marshal. No execution can issue against any property of the town. There is no remedy, except by mandamus to compel the levy of taxes, and taxes cannot be levied until the board of auditors audit, and the machinery provided in the Illinois township law is set in motion.

The simple statement of the case, as disclosed by the record, ought to bespeak the favorable consideration of this court in behalf of the relators.

On the recovery of the relators' judgments and the making of the demand to audit, the law imposed an obligation on the respondents to audit the judgments. The respondents do not claim, by any facts stated, to have attempted to resign their offices until after this duty had attached and become obligatory. The refusal of the board to act and their alleged resignations, made in the manner and under the circumstances set forth in the answer, show that these auditors were not acting from any honest motives, and that their willful design was to destroy the quorum requisite for auditing. Their conduct is a clear evasion of their duty. Under such

circumstances, the respondents ought to be compelled to discharge that duty.

There is no adjudication of the Illinois Supreme court, construing the statutes under consideration; so that this court is left to follow its own convictions. Cases somewhat analogous, however, have been reported and tend to sustain the position here contended for.

In *State ex rel. Carpenter v. Supervisors*, 20 Wisconsin 86, a case in which it was argued that the writ should not issue, because a vacancy existed in the requisite number of town supervisors, although the point was not decided by the court because not directly stated in the return, the court said: "A demand was made for the payment of two of the judgments when the board was full, and it may be very questionable whether the supervisors can shirk their responsibility or evade their duty by resignation or a refusal to act when elected."

In *Gorgus v. Blackburn and others*, 14 Ohio 252–256, the facts were, that the legislature repealed the act incorporating the town, but in the repealing act provided, that the officers of the town should have power to levy and collect taxes necessary to discharge the liabilities of the town. The persons, who were in office at the time the corporation became defunct, sought to escape this duty of levying taxes by resigning. The court held, in a proceeding by mandamus to compel the resigning officers to proceed, that the resignations were fraudulent, and that the officers could not by resignation avoid the duty of levying taxes to pay judgments recovered against the town.

In *Rogers v. The People ex rel.*, 68 Illinois R. p. 154–156, it was returned to the application for a mandamus to compel the payment of a debt, due from a school district, that the district had been dissolved by its several parts being attached to other districts through the action of the school trustees, who have the authority by statute so to do, and that the officers of the district had thus been legislated out of office. It was sought by the mandamus to hold the new districts liable for the debts of the old district. But the Supreme court held otherwise, and that for the purposes of the remedy, the old district would be deemed to exist; that service of summons could be had on the old officers, after the dissolution of the district; and that the collection of a judgment obtained against them could be enforced by a mandamus, even though the officers had ceased to be by reason of the destruction of the district.

The Supreme court on page 157 of the report say:

"The relator should have brought suit against the direc-
"tors of old district No. 1, put her claim into judgment, taken
"out the special execution provided, and enforced it by at-
"tachment or mandamus, as the exigencies might require.
"Relator's debt is a just one, and its payment cannot be
"evaded or escaped when the proper remedy is resorted to. It
"may be enforced by action against the directors of the old
"district. Service upon those, who were such directors at the
"time the new organization was made, will be good service.
"They constituted a body corporate, liable as such for this
"debt, and from which they cannot be relieved by the action
"of the trustees in forming the district into new organizations
"without apportioning the debt among them."

The doctrine of these cases seems to be, that for the purposes of the remedy the debts of a corporation can be enforced against it even after its dissolution, and that although the officers have become *functus officio*, on the death of the corporation, they can still be compelled to act, for the purposes of the remedy, and cannot evade the duty by resignation.

The same rule ought to be applicable to the several parts of the corporation, as well as to the whole. If the entire corporation may cease to exist, and its officers still be compelled to act for the purpose of the remedy, why should not an important board, like this auditing board, which alone can do the necessary acts required in this case, likewise be compelled to perform a duty, the performance of which is essential to the remedy, although such board has voluntarily ceased to exist? Here in the respondents' answer, it is virtually claimed that there is no board of auditors in this town; four of its members profess to have resigned, leaving no number of members sufficient to make a quorum; no appointing power exists to fill the alleged vacancies, for appointments cannot be made without the concurrence of the supervisor and town clerk, two of the resigning officers; no person will consent to be elected as successors to these officers. According to the answer, there are, in fact, no such successors, either elected or appointed, and the town, according to the theory of the answer, is without any board of auditors.

Under these circumstances, the relators claim that the respondents should be compelled to perform the duty alleged in the petition. No other remedy than this by mandamus, is open to the relators. Taxation cannot be made under an offi-

cer appointed by the court. An execution cannot issue against the property of the town, if even it has any tangible property. The corporators or inhabitants of the town cannot individually or collectively be held in any manner liable for the debts of this municipal corporation, for by the constitution of the State that is forbidden. The appropriate remedy is the one here sought, and if that cannot be exercised there is none, and the guaranty in the Illinois constitution, that "every person ought to find a certain remedy in the laws for all injuries and wrongs which he may receive in his person, property or reputation," will prove to be futile and but a glittering generality. If this proceeding cannot be sustained, then this town, and other towns like it, may repudiate their debts at pleasure and with impunity. If the position of the respondents be allowed to prevail, then an Illinois town or school district may build a town hall or school house, as the case may be, and when the work is done its officers may resign, the corporation refuse to pay for the work, and thus escape the process of the courts. The law ought not thus to be interpreted. This town ought to be held to the same accountability which attaches to other debtors. Its attempt at repudiation through its board of auditors, as disclosed in this record, ought not to receive any sanction or support in an enlightened court of law.

The case for the defendants in error is respectfully submitted.

GEORGE O. IDE,
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